# No. 15442

# United States
# Court of Appeals
## for the Ninth Circuit

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, Appellant,

vs.

VERDA A. GOREY, Appellee.

# Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —4-5-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

## NAMES AND ADDRESSES OF ATTORNEYS

For appellant:

JOHN C. MORROW,

210 No. 7th Street,
Los Angeles 14, California.

For appellee:

L. E. McMANUS

8505 Rosemead Blvd.,
Rivera, California.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. S.G. C 1069

VERDA A. GOREY, Plaintiff,

vs.

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, Defendant.

## COMPLAINT ON CONTRACT OF LIFE INSURANCE

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the defendant is a corporation doing business in the county of Los Angeles and state of California.

II.

That plaintiff, Verda A. Gorey, is the wife of George E. Gorey, now deceased, and the beneficiary named in policy number 2081957 on the life of George E. Gorey.

III.

That on or about the first day of May, 1954 at Whittier, California in consideration of the payment of the premiums of $8.38 monthly, the defendant, by its agents duly authorized thereto, executed its written policy of insurance number 2081957 to one George E. Gorey on his life in the sum of nine thousand three hundred sixty three dollars.

IV.

That on the 19th day of November, 1955 at Whittier, California, said George E. Gorey died.

V.

That up to the time of the death of said George E. Gorey, all premiums accrued upon said policy were fully paid.

VI.

That the said George E. Gorey and the plaintiff each performed all the conditions of said insurance on their part, and the plaintiff prior to the commencement of this action gave to the defendant notice and proofs of the death of said George E. Gorey, as aforesaid and demanded payment of the sum of $9363 whereupon defendant demanded of the plaintiff surrender of the policy of insurance aforementioned to it as a condition of payment; that the plaintiff surrendered the policy of insurance to defendant, and the said policy is now in the possession of defendant.

VII.

That the said sum has not been paid nor any part thereof, and that same is now due thereon from the defendant to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the sum of $9363.00 with interest thereon from the 19th day of November, 1955, at the rate of seven per cent per annum, and for the

costs of suit and such other and further relief as to this Court seems just and equitable.

L. E. McMANUS,
Attorney for the Plaintiff

Duly Verified.

[Endorsed]: Filed March 16, 1956.

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In the United States District Court, Southern District of California, Central Division

No. 19691 - WM

VERDA A. GOREY, Plaintiff,

vs.

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, Defendant.

## ANSWER TO COMPLAINT

Defendant The National Life and Accident Insurance Company, answers plaintiff's complaint herein as follows:

### First Defense

I.

Defendant admits the allegations contained in paragraphs I, II, IV and V of plaintiff's complaint.

II.

Defendant admits the allegations of paragraph III of plaintiff's complaint, except as follows: Defendant denies that the policy therein mentioned is or was in the sum of $9363.00 or in any other sum other than the Ultimate Amount Insured of $3300.00,

plus amount of family income of $33.00 monthly for such period as is mentioned therein; and defendant alleges that as an additional and material consideration and inducement for the issuance of said policy, said George E. Gorey on or about April 14, 1954, made, executed and delivered to the defendant his written application for issuance and delivery to him by defendant of said policy of insurance; and that a true copy of said application is attached hereto marked Exhibit "A" and made a part hereof and defendant alleges that it relied upon the truth of all of the statements and representations made by said George E. Gorey and contained therein. Defendant further alleges that on or about April 20, 1954, said George E. Gorey stated to Sutton H. Groff, M. D., the defendant's medical examiner, the following: that he had never had any ailment or disease of the heart, that he had never consulted any physician, and that he had never undergone an electrocardiogram. Defendant alleges that it relied upon the truth of all of the statements and representations made by said George E. Gorey to defendant's said medical examiner. Defendant alleges that said policy of insurance was issued by defendant under date of April 30, 1954 and was thereafter delivered to said George E. Gorey; that said application, Exhibit "A" and said policy of insurance provide that said policy would become effective only after delivery thereof to the insured during his lifetime and good health; and that a true copy of said application, Exhibit "A" aforesaid, was attached to and made a part of said policy.

III.

Defendant, answering paragraph VI of plaintiff's complaint, admits that after the death of said insured and prior to the commencement of her action, plaintiff gave defendant notice and proofs of the death of said George E. Gorey and demanded payment of the sum she claimed to be due under said policy; admits that plaintiff delivered said policy to defendant, but denies that it was delivered for any reason or under any conditions other than as hereinafter alleged. Defendant alleges that after the receipt of the notice and proofs of death of said George E. Gorey from plaintiff, it made an investigation of the facts and circumstances connected with his securing said policy of insurance; that from such investigation, it for the first time learned that he had concealed and misrepresented the true condition of his health as well as concealed the facts that he had or had had an ailment or disease of the heart, that he had consulted a physician therefor, and that he had undergone an electrocardiogram. Defendant alleges that it advised plaintiff of said investigation and of the concealments and misrepresentations so made by said George E. Gorey, and that because of the same, it was not liable for and it would not pay her the death benefit mentioned in said policy, nor any other sum except the amount of the premiums it had received thereunder, plus interest on said premiums from the dates of payment thereof; that defendant advised plaintiff that said premiums and interest amounted to $168.07 and it would pay plaintiff the same upon surrender and

delivery of the policy and in full settlement of all claims in connection therewith. Defendant alleges that on or about January 10, 1956 it paid said plaintiff said $168.07 as and in full settlement of plaintiff's claims under and in connection with said policy and plaintiff thereupon surrendered and delivered said policy to *plaintiff*. Except as hereinabove expressly admitted and alleged, defendant denies each and all of the allegations contained in said paragraph VI of plaintiff's complaint.

IV.

Denies that there is now due from defendant to plaintiff by reason of said policy, or otherwise, or at all, the sum of $9363.00 or any other sum or amount whatever.

Second Defense

I.

Defendant repeats herein paragraphs I, II, III and IV of defendant's first defense hereinabove set forth and makes the same a part hereof as though fully realleged herein.

II.

Defendant alleges that in and by said application, Exhibit "A" aforesaid, and the said policy of insurance No. 2081957, said George E. Gorey expressly and fraudulently stated and warranted that at the time of the execution of said application he had never had any ailment or disease and particularly had never had any ailment or disease of the heart, that he had never consulted any physician and that there was nothing in his personal history

not mentioned elsewhere in said application; that each of said statements and warranties was material to the risk to be insured against and they were relied upon by defendant in issuing and delivering said policy to said George E. Gorey; and that in truth and in fact said George E. Gorey then and prior to the execution of said application had an ailment of the heart, that he had consulted with and received treatment from a physician, namely, R. R. Kerchner, M. D., and that he had undergone an electrocardiogram. Defendant alleges that it was wholly without knowledge of the falsity of said statements and breach of said warranties at the inception of said policy of insurance, and that by reason of the falsity of said statements and breach of warranties in its inception, said policy of insurance did not become effective and no obligation arose against the defendant thereunder, or otherwise, or at all, except to pay plaintiff the amount of the premiums theretofore paid thereon, and interest thereon. Alleges that defendant paid plaintiff said premiums and interest, amounting to $168.07, prior to the filing of plaintiff's action on said policy.

Third Defense

I.

Defendent repeats herein paragraphs I, II, III and IV of defendant's first defense hereinabove set forth and makes the same a part hereof as though fully realleged herein.

II.

Defendant alleges that at the time of executing

said application, Exhibit "A" aforesaid, said George E. Gorey stated therein that he had no ailment or disease and particularly no ailment or disease of the heart and that he had never consulted any physician and that there was nothing in his personal history not mentioned elsewhere in said application; that said George E. Gorey on or about April 20, 1954, stated to Sutton H. Groff, M. D., defendant's medical examiner that he had never had any ailment or disease of the heart, that he had never consulted any physician and that he had never undergone any electrocardiogram; that defendant relied upon said statements and representations; that in truth and in fact at the time of executing said application, and at the time of making said statements to defendant's said medical examiner, said George E. Gorey did have an ailment or disease of the heart, he had previously consulted and been treated therefor by a physician, namely, R. R. Kerchner, M. D. during the month of October, 1953, and that during said month of October, 1953 he had undergone an electrocardiogram by said physician, R. R. Kerchner, M. D. Defendant alleges that at the time of the issue of said policy of insurance and at the time of the payment of the first premium thereon and at the time of the delivery to and acceptance of said policy by said George E. Gorey, he was not in good health; that the falsity of the aforesaid statements and representations so made by him was at all times well known to said George E. Gorey, but he failed then or at all to disclose the falsity of the same, or any thereof, to the

defendant; and that the falsity of said statements and representations were not known to or discovered by the defendant until some time after the death on November 19, 1955 of said George E. Gorey. Defendant alleges that by reason of the false statements and representations of said George E. Gorey aforesaid, the defendant was deceived and induced to issue and deliver the said policy of insurance, and that no obligation arose thereunder or otherwise or at all, except to pay plaintiff the amount of the premiums theretofore paid thereon, and interest thereon; and defendant alleges that it paid plaintiff therefor in the sum of $168.07 prior to the filing of plaintiff's action on said policy.

Fourth Defense

I.

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore defendant prays judgment as follows:

1. That plaintiff take nothing by her action;
2. For costs of suit; and
3. For such other relief as may be proper.

Dated March 21, 1956.

OVILA N. NORMANDIN,
JOHN C. MORROW,
/s/ By OVILA N. NORMANDIN,
Attorneys for defendant The National Life and Accident Insurance Company.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

PRE-TRIAL STIPULATIONS

(A) "Statement of Admitted Facts"

* * * * *

Counsel for the respective parties in the above entitled proceeding, pursuant to the Court order of April 15, 1956 re Pre-trial proceedings, have conferred with reference to the matters in litigation as to which admissions may be made; and they have agreed to and hereby make the following "Statement of Admitted Facts"

1. That the plaintiff is and at all times mentioned in the complaint was a resident and citizen of the State of California, and is the surviving wife of George E. Gorey, now deceased.

2. That the defendant is a corporation organized and existing under the laws of the State of Tennessee, and a resident and citizen of the State of Tennessee; and that it was and is doing business in the County of Los Angeles, State of California.

3. That on or about April 14, 1954 said George E. Gorey made, executed and delivered to defendant at Whittier, California, his written application for the issuance and delivery to him of a life insurance policy on his life in the amount of $3300.00 upon the Family Income Plan. That a true copy of said application marked Exhibit "A" is attached to and made a part of defendant's Answer on file herein.

4. That said George E. Gorey paid defendant the sum of $8.34 on or about April 14, 1954 as the first monthly premium on said policy.

5. That defendant relied upon the application, the report of the medical examiner of defendant and the report of inspection by defendant's Agent and under date of April 30, 1954 it issued and thereafter delivered to George E. Gorey its life insurance policy No. 2081957 on his life; and that plaintiff was and is named as beneficiary in said policy. That said life insurance policy provides that in the event of the death of said George E. Gorey during the second year of the policy, the beneficiary would have the right to elect to receive payment of the sum of $8824.00 as the commuted proceeds payable under said policy in lieu of all other settlement provisions thereunder, in full settlement of all claims and rights of the beneficiary.

6. That said application, Exhibit "A", and said policy of insurance provide that the policy would become effective only after delivery thereof to the insured during his lifetime and good health; and that a true copy of said application, Exhibit "A" aforesaid, was attached to and made a part of said policy at the time of issuance and delivery thereof to said George E. Gorey.

7. That said George E. Gorey died on November 19, 1955 at Whittier, California, and up to that time all premiums called for by said policy had been fully paid.

8. That after the death of said George E. Gorey and before the commencement of plaintiff's action herein, plaintiff gave defendant notice and proofs of death of said George E. Gorey and demanded

payment of the sum she claimed to be due under said policy.

9. That after said receipt by defendant of the notice and proofs of death of said George E. Gorey, and before plaintiff filed her action herein, the defendant made an investigation of the facts and circumstances connected with his applying for and securing said policy of insurance; that it advised the plaintiff of said investigation and the defendant told plaintiff it was not liable for and it would not pay her the death benefit mentioned in the policy, nor any other sum, except the amount of premiums it had received thereunder, plus interest on the same from the dates of payments thereof; that defendant advised plaintiff said premiums and interest amounted to $168.07.

10. That said application, Exhibit "A" aforesaid, stated among other things, the following questions to be answered by the applicant and contains the following answers to said questions, to-wit: "Question 54. Have you ever had any ailment or disease of: B. Heart or lungs? Yes or No. No." "Question 60. State names and addresses of physicians you have ever consulted and give the occasion by reference to question number and letters above. None". That defendant relied upon said application and on said answers to said questions in issuing and delivering said policy to said George E. Gorey.

11. That on April 20, 1954 said George E. Gorey was examined by Sutton H. Groff, M. D., the de-

fendant's medical examiner at Montebello, California, in connection with said application, Exhibit "A" aforesaid; that said medical examiner's written report of said examination was set forth on the reverse side of said application, Exhibit "A" aforesaid, and was delivered to the defendant before said policy was issued; that said medical examiner's report was exhibited to plaintiff's counsel on May 11, 1956; and that defendant relied upon said medical examiner's report in issuing and delivering said policy to said George E. Gorey.

Dated May 25, 1956.

/s/ L. E. McMANUS,
Attorney for Plaintiff.

OVILA N. NORMANDIN,
JOHN C. MORROW,
/s/ By OVILA N. NORMANDIN,
Attorneys for Defendant.

(B) "Statement of Unadmitted Facts—Not To Be Contested."

Counsel for the respective parties in the above entitled proceeding, pursuant to the Court order of April 15, 1956 re Pre-trial proceedings, have conferred with reference to the matters in litigation as to Unadmitted Facts which are not to be contested; and they have agreed to and hereby make the following "Statement of Unadmitted Facts, Not to be Contested".

1. That during the month of October, 1953, at Montebello, California, George E. Gorey consulted

and was examined by R. R. Kerchner, M. D.; that said R. R. Kerchner, M. D. diagnosed the physical condition of said George E. Gorey and had him undergo an electrocardiogram; and that following his electrocardiogram, said R. R. Kerchner, M. D. prescribed treatment for George E. Gorey.

2. That after the death of George E. Gorey and after the defendant completed its investigation of the facts and circumstances connected with his application for and securing the issuance to him of the life insurance policy in suit from the defendant, said defendant tendered and delivered to plaintiff its check No. 42127 in her favor for $168.07 representing the premiums theretofore paid on said policy, plus interest.

3. That the disease or condition directly leading to death as shown in the certified copy of the Certificate of Death of said George E. Gorey was Acute Myocardial Infarction, and the antecedent cause was Coronary-Arterio-sclerosis.

Dated May 31, 1956.

OVILA N. NORMANDIN,
JOHN C. MORROW,

/s/ By OVILA N. NORMANDIN,
Attorneys for Defendant.

/s/ L. E. McMANUS
Attorney for Plaintiff.

* * * * *

[Endorsed]: Filed June 1, 1956.

[Title of District Court and Cause.]

DEFENDANT THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY'S REQUESTED JURY INSTRUCTIONS.

Defendant The National Life and Accident Insurance Company hereby requests that each and all of the following instructions be given by the Court to the jury.

OVILA N. NORMANDIN and
JOHN C. MORROW,
/s/ By JOHN C. MORROW,

Attorneys for Defendant The National Life and Accident Insurance Company.

* * * * *

Defendant's Requested Instruction No. 3

You are instructed that if George E. Gorey was treated by a physician before the date of the making of the application for the policy of insurance involved in this case, that is, before April 14, 1954, that fact is presumed to have been within the personal knowledge of George E. Gorey, and if his representations in his application with regard to having ever consulted a physician for any ailment or disease of the heart are false, he was guilty of fraud, although as a matter of fact, he might not have intended to deceive the company, and your verdict should be for the defendant company.

Telford v. New York Life Insurance Co., 9 Cal. (2d) 103.

* * * * *

Defendant's Requested Instruction No. 5

You are instructed that if George E. Gorey, the applicant, concealed the fact that he had consulted a physician concerning which enquiry was made by the defendant company in the application for insurance, it is not necessary that the matter concealed affect the length of the insured's life. If you find that there was a concealment by reason of the failure of George E. Gorey to disclose his consultations with a physician or physicians, your verdict must be for the defendant company even though you believe that the ailment or disease for which the consultation or consultations was had did not shorten the life of George E. Gorey.

McEwen v. New York Life Insurance Co., 42 Cal. App. 133.

* * * * *

Defendant's Requested Instruction No. 8

If George E. Gorey concealed any material fact or facts with regard to his medical history, the plaintiff cannot recover in this action and this is true, although you may find that the facts concealed had no connection with the cause of George E. Gorey's death.

Madsen v. Maryland, 168 Cal. 204.

McEwen v. New York Life Insurance Co., 42 Cal. App. 133.

Defendant's Requested Instruction No. 9

You are instructed that the requirement of fair dealing is laid on both parties to the insurance policy involved in this action. This requirement imposed a duty on the part of George E. Gorey, the insured, to read the insurance policy and the photostatic copy of his application attached thereto upon the delivery thereof to him by the defendant company, and you may assume that he did so and that he had full knowledge of the questions contained in said application and his answers thereto. He also had a duty to report to the defendant company any misrepresentations set forth in or omissions in his application within a reasonable time. If you find that he neglected to so inform the defendant company of any such material misrepresentation or omission, your verdict should be for the defendant company.

Telford v. New York Life Insurance Co., 9 Cal. (2d) 103.

Layton v. New York Life Insurance Co., 55 Cal. App. 202.

Defendant's Requested Instruction No. 10

You are instructed that the fact that George E. Gorey was examined by one of the defendant company's medical examiners at or about the time of his application for insurance in no way affects the right of the defendant company to deny liability under the policy of insurance involved in this action if a full and truthful disclosure of facts concern-

ing which the defendant company made enquiry was not made by George E. Gorey in his application for insurance.

California Insurance Code, Sections 331 and 359.

Robinson v. Occidental Life Insurance Co., 131 Cal. App. (2d) 581.

Defendant's Requested Instruction No. 11

You are instructed that the policy of insurance involved in this action was delivered to George E. Gorey in May, 1954, and at the time of delivery a photostatic copy of the application therefor was attached thereto; that the policy and the application therefor constituted the entire contract between the defendant company and George E. Gorey. George E. Gorey, over his own signature, declared that each of the statements contained in said application were full, complete, true and without exception, unless such exception was noted. The statements contained in the application thereby became his solemn representations and of the same binding force upon him as though he had himself written them out in his own handwriting and signed them.

Layton v. New York Life Insurance Co., 55 Cal. App. 202.

Westphall v. Metropolitan Life Insurance Co., 27 Cal. App. 734.

Robinson v. Occidental Life Insurance Co., 131 Cal. App. (2d) 581.

Defendant's Requested Instruction No. 12

You are instructed that if you find that George E. Gorey, in October, 1953, supposing himself to be in need of a physician, did consult a physician and answered such enquiries as the physician deemed pertinent and received aid, advice or treatment which the physician deemed necessary, he had consulted a physician within the meaning of the question asked relative thereto in his application for the insurance policy.

California Western States Life Insurance Co. v. Feinstein, 15 Cal. (2d) 413.

Whitney v. West Coast Life Insurance Co., 177 Cal. 74.

Defendant's Requested Instruction No. 13

The defendant company was entitled to have a full, complete and true statement by George E. Gorey of the names and addresses of physicians he had ever consulted before he applied for the policy of insurance involved in this action insofar as the defendant company made enquiries of George E. Gorey relative thereto at the time he made said application. The written application for the insurance policy involved in this action made by George E. Gorey to the defendant company on or about April 14, 1954 includes the question to George E. Gorey, the applicant,: "State names and addresses of physicians you have ever consulted and give the occasion by reference to question numbers and let-

ters above". If you find that George E. Gorey answered this question in said application by stating that he had never consulted any physicians, and if you further find that before making said application George E. Gorey had consulted a physician, namely, R. R. Kerchner, M.D., your verdict must be for the defendant company.

Whitney v. West Coast Life Insurance Co., 177 Cal. 74.

* * * * *

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 6, 1956.

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[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find in favor of the plaintiff, Verda A. Gorey, and against the defendant, The National Life and Accident Insurance Company, for the sum of $9,431.00.

Los Angeles, California, November 15, 1956.

/s/ JOHN J. RUDEEN,
Foreman of the Jury.

[Endorsed]: Filed Nov. 15, 1956.

In The United States District Court, Southern District of California, Central Division

No. 19691-WM

VERDA A. GOREY, Plaintiff,

vs.

THE NATIONAL LIFE AND ACCIDENT INSURANCE CO., Defendant.

JUDGMENT

This cause having been tried and submitted to the jury and the Jury having returned its verdict, now therefore, in accordance with said verdict and pursuant to law and the premises aforesaid,

It Is Ordered, Adjudged and Decreed that the Plaintiff, Verda A. Gorey, have and recover of and from the Defendant, The National Life and Accident Insurance Company, the sum of Nine Thousand Four Hundred and Thirty-one Dollars ($9,431.00), together with costs taxed in the amount of $57.85.

Witness the Honorable William C. Mathes, Judge of the above-entitled court, this 16th day of November, 1956.

JOHN A. CHILDRESS,
Clerk,
/s/ By P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed Nov. 16, 1956. Docketed and Entered Nov. 20, 1956.

[Title of District Court and Cause.]

## MOTION TO SET ASIDE VERDICT AND FOR JUDGMENT OR FOR NEW TRIAL—NOTICE OF MOTION

Defendant The National Life and Accident Insurance Company hereby moves the Court to set aside the verdict received and entered in the above entitled cause on November 15, 1956, and to enter judgment for defendant in accordance with its motion for a directed verdict on the following grounds:

The motion for a directed verdict should have been granted because:

1. The evidence in the case showed conclusively, and was without conflict, that the insured in his written application for the insurance policy falsely represented to defendant:

(a) That he had never had any ailment or disease of the heart, and

(b) That he never had consulted any physician.

2. The evidence in the case showed conclusively, and was without conflict, that the insured by his answers to questions in his written application for the insurance policy and at all times thereafter concealed from defendant:

(a) That he had consulted a physician, viz, Dr. R. R. Kerchner in October, 1953, and thereafter prior to the date of the application, and

(b) That he had a disease of the heart, viz, coronary arteriosclerosis and coronary insufficiency.

3. The evidence in this case showed conclusively, and was without conflict, that by the report of defendant's medical examiner signed by the insured prior to the issuance of the insurance policy the insured misrepresented to said medical examiner that he had never undergone an electrocardiogram and also that the insured concealed from said medical examiner the fact that he had undergone an electrocardiogram.

4. It was an admitted fact in the case that defendant relied upon said application and said medical examiner's report in issuing said insurance policy.

5. The evidence in the case showed conclusively and was without conflict, that the insured did not at any time after the insurance policy was issued and delivered to him communicate with defendant or advise defendant of any such or any misrepresentation or misstatement set forth in said application, a photostatic copy of which was attached to the policy, nor did insured advise defendant that he had previously undergone an electrocardiogram.

6. The evidence in the case showed conclusively and was without conflict, that defendant would not have issued the policy if it had been advised of or had had knowledge of any of said facts misrepresented to and concealed from it by insured, and the evidence showed conclusively, and was without conflict, that defendant had no knowledge of any of

said misrepresentations or concealments at any time until after the insured died.

In the alternative, defendant moves the Court to set aside the verdict and grant defendant a new trial on each of the following grounds, vis:

1. That the verdict is against the weight of the evidence and contrary to the preponderance of the evidence on each and all of the matters hereinabove specified under points (1) to (6), inclusive; that accordingly defendant made a legal defense to plaintiff's action on the policy, and that the verdict will result in a miscarriage of justice if not set aside.

2. That substantial and prejudicial error of law was committed and resulted from the giving of instructions to the jury on the law, to wit, instructions numbers 6-A, 12, 12-A, 13 and 14.

3. That substantial and prejudicial error of law was committed and resulted from the failure of the Court to give instructions to the jury on the law as to various important questions necessarily involved in defendant's affirmative defenses and upon which evidence was introduced, vis, defendant's requested instructions numbers 3, 5, 7, 8, 9, 10, 11 and 12.

These motion are made upon all of the pleadings, files and proceedings in this case.

Dated: November 21, 1956.

OVILA N. NORMANDIN and
JOHN C. MORROW

/s/ By JOHN C. MORROW,

Attorneys for defendant, The National Life and Accident Insurance Company.

## NOTICE OF MOTION

To Plaintiff, Verda A. Gorey, and to L. E. McManus, Esq., her attorney:

Please Take Notice that the undersigned will bring the above motions on for hearing before this court in the courtroom of the Honorable William C. Mathes, District Judge, in the Federal Court House and Post Office Building, Los Angeles, California, on Monday, December 3, 1956, at the hour of 10:00 o'clock A. M., of said day, or as soon thereafter as counsel can be heard.

Said motions are made upon the grounds stated in the attached written motions, upon all of the pleadings, files and proceedings in this case, and upon the attached memorandum of points and authorities.

Dated: November 21, 1956.

OVILA N. NORMANDIN and
JOHN C. MORROW,
/s/ By JOHN C. MORROW,
Attorneys for defendant, The National Life and Accident Insurance Company.

* * * * *

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Nov. 21, 1956.

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTIONS FOR JUDGMENT n.o.v. (Fed. R. Civ. P. 50 (b)) or FOR A NEW TRIAL

This cause having come before the Court for hearing on the motions of defendant filed November 21, 1956, for judgment notwithstanding the verdict or for a new trial (Fed. R. Civ. P. 5 (b)), and the motions having been heard and submitted for decision,

It Is Ordered that defendant's motions are hereby denied. (See: Columbia Ins. Co. v. Lawrence, 35 U. S. (10 Peters) 507, 516 (1836); Liberty National Life Ins. Co. vs. Hamilton, 237 Fed. 2nd 235 (6th Cir. 1956); Gates v. General Cas. Co., 120 Fed. 2nd 925 (9th Cir. 1941); Ocean Acc. etc. Corp. v. Rubin, 73 Fed. 2nd 157 (9th Cir. 1934); Parrish v. Acacia Mut. Life Ins. Co., 92 Fed. Supp. 300 (S.D. Cal. 1949), affirmed 184 F. 2nd 185 (9th Cir. 1950); Ransom v. Penn. Mut. Life Ins. Co., 274 P. 2nd (Cal) 633, 637 (1954); Robinson v. Occidental Life Ins. Co., 281 P. 2nd (Cal. App.) 39, 42 (1955); Standard Accident Ins. Co. v. Pratt, 278 P. 2nd (Cal. App.) 489, 492 (1955)).

December 21, 1956.

/s/ WM. C. MATHES,
United States District Judge.

L. E. McManus,
Attorney for Plaintiff.

Ovila N. Normandin and
John C. Morrow,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 21, 1956.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that defendant The National Life and Accident Insurance Company hereby appeals to the United States Court of Appeals For The Ninth Circuit from the final judgment entered in this action on November 20, 1956, and from the order entered in this action on December 21, 1956, denying said defendant's motion to set aside verdict and for judgment or for new trial under F.R.C.P., Rules 50 (b) and 59.

Dated: January 8, 1957.

OVILA N. NORMANDIN and
JOHN C. MORROW,
/s/ By JOHN C. MORROW,
Attorneys for the defendant The National Life and Accident Insurance Company.

[Endorsed]: Filed Jan. 8, 1957.

[Title of District Court and Cause.]

## STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

The points upon which defendant and appellant, The National Life and Accident Insurance Company intends to rely on this appeal are as follows:

1. The court erred in denying and in not granting defendant's motion for a directed verdict and motion to set aside verdict and for judgment under F.R.C.P. Rule 50(b).

2. The court erred in instructing the jury and in refusing to give certain jury instructions requested by defendant.

3. The court erred in denying and in not granting defendant's alternative motion for a new trial.

Dated: February 6th, 1957.

OVILA N. NORMANDIN and
JOHN C. MORROW,
/s/ By JOHN C. MORROW,
Attorneys for defendant and appellant The National Life and Accident Insurance Company.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 7, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

The foregoing pages numbered 1 to 150, inclusive, containing the original

Petition for Removal; Notice of Filing Petition for Removal;

Answer;

Demand for Jury Trial;

Order for Pre-Trial Proceedings;

Plaintiff's Memorandum Prior to Trial;

Interrogatories to Plaintiff;

Memorandum of Law on behalf of Defendant;

Pre-Trial Stipulations;

Requested Instructions by the Plaintiff;

Defendant's Pre-Trial Opening Statement & Pre-Trial Statement as to Status;

Defendant's Requested Jury Instructions;

Answer to Defendant's Interrogatories;

Interrogatories to President of Defendant;

Pre-Trial Statement as to Status of Case;

Answer of President of Defendant to Plaintiff's Interrogatories;

Defendant's Additional Requested Jury Instruction;

Defendant's Request for Special Verdict and Requested Forms of Written Questions;

Plaintiff's Objections to Special Verdict & Request for Interrogatories;

Defendant's Reply to Objections to Special Verdict & Defendant's Objections to Requested Interrogatories;

Verdict;

Judgment;

Motion to Set Aside Verdict & for Judgment or for New Trial, together with Notice of and Memorandum of Points & Authorities in Support Thereof;

Bill of Costs;

Memorandum of Points & Authorities in Opposition to Defendant's Motion to Set Aside the Verdict and for Judgment and in the Alternative for new Trial;

Order on Defendant's Motion for Judgment;

Notice of Appeal;

Statement of Points on Which Appellant Intends to Rely;

Designation of Record; and a full, true and correct copy of the Minutes of the Court on November 13, 14, 15, 1956; December 3, 1956;

B. Plaintiff's exhibits 1, 2 & 3 and defendant's A through G-1, inclusive.

I further certify that my fee for preparing the

foregoing record amounting to $1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 15th day of February, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk.
/s/ By CHARLES E. JONES,
Deputy.

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In The United States District Court, Southern District of California, Central Division

No. 19691-WM Civil

VERDA A. GOREY, Plaintiff,

vs.

THE NATIONAL LIFE AND ACCIDENT INSURANCE CO., Defendant.

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Nov. 13 and 14, 1956

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Plaintiff L. E. McManus, Esq., 8505 Rosemead, Rivera, California. For the Defendant: Ovila N. Normandin and John C. Morrow, Esqs., 740 South Broadway, Los Angeles 14, California. [1*]

* * * * *

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: The plaintiff may call her first witness.

Mr. McManus: Your Honor, I believe that counsel for the defendant and myself can arrive at some stipulations.

The Court: Very well, Mr. McManus, will you stand at the lecturn and present them.

Mr. McManus: This is a statement of admitted facts. One, that the plaintiff is and at all times mentioned in the complaint was a resident and citizen of the State of California and is the surviving wife of George E. Gorey, now deceased. Two, that the defendant is a corporation organized and existing under the laws of the State of Tennessee and a resident and citizen of the State of Tennessee and that it was and is doing business in the County of Los Angeles, State of California. Three, that on or about April 14, 1954, said George E. Gorey made and executed and delivered to the defendant in Whittier, California, his written application [8] for the issuance to and delivery to him of a life insurance policy on his life in the amount of $3,300 upon the family income plan; that a true copy of said application marked Exhibit A is attached to and made part of the defendant's answer on file herein. Four, that said George E. Gorey paid defendant the sum of $8.34 on or about April 14, 1954, as the first monthly premium on said policy. Five, that the defendant relied upon the application, the report of the medical examiner of the defendant and the report of inspection by the defendant's agent and under date of April 30, 1954, it issued and thereafter

delivered to George E. Gorey its life insurance policy number 2081957 on his life and that plaintiff was and is named as beneficiary in said policy. That said life insurance policy provides that in the event of the death of said George E. Gorey during the second year of the policy the beneficiary would have the right to elect to receive payment of the sum of $8,824 as commuted proceeds payable under said policy in lieu of all other settlement provisions thereunder in full settlement of all claims and rights of the beneficiary. Six, that said application, Exhibit A, and said policy of insurance provides that the policy would become effective only if delivered thereafter to the insured during his life in good health and that a true copy of said application, Exhibit A aforesaid, was attached to and made part of said policy at the [9] time of issuance and delivery thereof to said George E. Gorey. Seven, that said George E. Gorey died on November 19, 1955, at Whittier, California, and up to that time all premiums called for by said policy had been fully paid. Eight, that after the death of said George E. Gorey and before the commencement of plaintiff's action herein, plaintiff gave defendant notice and proofs of death of said George E. Gorey and demanded payment of the sum she claimed to be due under said policy. Nine, that after said receipt by defendant of the notice and proofs of death of said George E. Gorey and before plaintiff filed her action herein, the defendant made an investigation of the facts and circumstances connected with his applying for and securing said policy of insurance and that it

advised the plaintiff of said investigation of the defendant and told the plaintiff it was not liable for and it would not pay her the death benefit mentioned in the policy nor any other sum except the sum of premiums it had received thereunder plus interest on the same from the dates of payment. Thereafter that defendant advised plaintiff said premiums and interest amounted to $168.07. Ten, that said application, Exhibit A aforesaid, stated among other things the following questions to be answered by the applicant and contains the following answers to said questions, to wit, Question 54, "Have you ever had any ailment or disease, (b) Heart or lungs, yes or no?" "No." That means that answer is "No" counsel. [10]

Mr. Morrow: That means that's the answer that's given to the question?

Mr. McManus: Yes. Question 60, "State names and addresses of physicians you have ever consulted and give the occasion by reference to question number and letters above." "None."

Mr. Morrow: The answer is "No," counsel?

Mr. McManus: Yes. That the defendant relied upon said application and on said answers to said questions in issuing and delivering said policy to said George E. Gorey. Eleven, that on April 20, 1954, said George E. Gorey was examined by Sutton H. Groff, M.D., defendant's medical examiner, at Montebello, California in connection with said application, Exhibit A aforesaid. That said medical examiner's written report of said examination was

set forth on the reverse side of said application, Exhibit A aforesaid, and was delivered to the defendant before said policy was issued. That said medical examiner's report was exhibited to plaintiff's counsel on May 11, 1956, and that the defendant relied upon said medical examiner's report in issuing and delivering said policy to said George E. Gorey.

Mr. Morrow: Pardon me just a moment. The stipulation is correct, Mr. McManus. May I inquire privately of Mr. McManus, your Honor?

The Court: You may.

Mr. McManus: And it is further stipulated that the [11] defendant tendered and delivered to plaintiff its check number 42127 in the plaintiff's favor for $168.07 representing the premiums theretofore paid on said policy plus interest.

Mr. Morrow: So stipulated.

The Court: I assume we include in that stipulation that the plaintiff refused to accept that check?

Mr. Morrow: We were just discussing that matter. We don't know quite how to put it. Anyway, that's the understanding. She didn't accept the check in payment of the death benefit provided in the policy.

Mr. McManus: That's correct, your Honor.

The Court: Very well, the jury will understand that. Here is one of those things I was telling you about, a stipulation where both sides agree certain facts are true, the facts read to you by Mr. McManus is his statement just made and the statements made by Mr. Morrow constitute a stipulation

or agreement that the facts covered by the so-called stipulation are true and you are to accept them without the necessity of calling witnesses and offering evidence to prove that those facts are true. It's time for the noon recess. We will take a recess at this time until 2 o'clock. Before we separate, I must admonish you of your duties not to converse or otherwise communicate among yourselves or anyone else upon any subject touching upon the merits of this trial and not to form or express an opinion on the case to anyone until [12] after the case is finally submitted to you for your verdict. You are now excused until 2 o'clock this afternoon.

(Whereupon the jury retired from the courtroom.)

The Court: Is it stipulated the jury have retired from the courtroom?

Mr. McManus: Yes, your Honor.

The Court: Anything counsel have to take up before we call a recess?

Mr. McManus: I believe I have nothing, your Honor.

Mr. Morrow: We wouldn't know of anything, your Honor. We are going to have witnesses here we spoke about in Chambers at 2 o'clock, which I assume will be plenty of time.

The Court: Oh, yes. You expect to call Mrs. Gorey?

Mr. McManus: I believe there will be——

The Court: To offer the policy?

Mr. McManus: To offer the policy. We will take a short time.

The Court: Very well. We will recess until 2 o'clock, then, gentlemen.

(Whereupon a recess was taken until 2:00 p.m. of the same day.) [13]

The Court: In the case on trial, are you ready to proceed, gentlemen:

Mr. Mc Manus: Yes, your Honor.

The Court: Will you summon the jury, Mr. Bailiff.

(Whereupon the jury enter the jurybox.)

The Court: Is it stipulated, gentlemen, the jury is present?

Mr. McManus: Yes, so stipulated.

The Court: You may proceed.

VERDA A. GOREY

called as a witness in her own behalf, having first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name.

The Witness: Mrs. Verda A. Gorey.

Mr. McManus: Will you please mark this for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Direct Examination

Q. (By Mr. McManus): Mrs. Gorey, you are the widow of George E. Gorey, is that correct?

A. Yes. [14]

Q. Mrs. Gorey, I want to hand you what the reporter has marked as Plaintiff's Exhibit 1 and

(Testimony of Verda A. Gorey.)

ask you if that's the policy which you received from the defendant company? A. Yes.

The Court: What is your answer?

The Witness: Yes.

Q. (By Mr. McManus): Now, Mrs. Gorey on what date did your husband die?

A. November 19, 1955.

Q. And did you thereafter make claim for payment on this insurance policy? A. Yes, I did.

Q. And is it a fact that the defendant refused to pay you? A. Yes.

Mr. McManus: I believe that will be all. You may cross examine. Oh, one other thing. I would like to introduce the death certificate.

Mr. Morrow: I believe you have introduced the policy?

The Court: You offered the policy?

Mr. McManus: Yes.

The Court: Any objection?

Mr. Morrow: No.

The Court: The policy is received as Plaintiff's Exhibit 1. [15]

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Mr. McManus: Yes, your Honor, Exhibit 1 in evidence. Then the death certificate, defendant's Exhibit No. D.

The Court: Is that a certified copy of the death certificate?

Mr. McManus: Yes, it is.

(Testimony of Verda A. Gorey.)

The Court: Any objection?

Mr. Morrow: No objection, your Honor.

The Court: You offer it?

Mr. McManus: We offer that in evidence.

The Court: Received in evidence as Plaintiff's Exhibit 2.

(The document referred to, marked Defendant's Exhibit D, was received in evidence as Plaintiff's Exhibit 2.)

The Court: Is there any cross examination?

Mr. Morrow: Just one or two questions, your Honor.

Cross Examination

Q. (By Mr. Morrow): Mrs. Gorey, the application for insurance attached to the life insurance policy just introduced into evidence states that Mr. Gorey was self-employed and that he was a builder and developer. That's true, was it?

A. Yes. [16]

Q. And how long before his death had he been self-employed as a builder and developer?

A. Well, when he was self-employed, it was several years prior to his death.

Q. By several years you mean more than three or four years? A. At least two.

Q. Prior to his death? A. Yes.

Q. The date of the application is, I believe, April 14, 1954. Does that refresh your recollection that he had been self-employed as a builder and developer for some time prior to that date?

(Testimony of Verda A. Gorey.)

A. Well, partially.

Q. How is that?

A. Partially he was self-employed afterwards doing odd jobs.

Q. And for how long before April 14, 1954, had he been self-employed as a builder and developer, approximately how long?

A. It's hard to say exactly but I would say around a year.

Mr. Morrow. Thank you.

The Court: Any further questions of the plaintiff?

Mr. Morrow: No further questions.

Mr. McManus: No further questions. [17]

The Court: You may step down.

Mr. McManus: The plaintiff will rest.

The Court: The plaintiff rests. The defense may proceed.

Mr. Morrow: If the Court please, we have a few exhibits we would like to offer at this time.

The Court: Very well.

Mr. Morrow: The first is the original application for insurance dated April 14, 1954. I might say a photostatic copy is attached to the original life insurance policy but we should like to offer the original application at this time.

The Court: Any objections?

Mr. McManus: No objection.

The Court: It is stipulated to be genuine and in all respects what it purports to be?

Mr. Morrow: Yes, your Honor.

The Court: Received in evidence as Defendant's Exhibit.

The Clerk: Defendant's Exhibit A, your Honor.

(The document referred to was marked Defendant's Exhibit A in evidence.)

Mr. Morrow: The defendant also offers in evidence at this time the medical examiner's report which I believe the clerk has in his possession marked for identification.

The Court: Is it marked, Mr. Clerk?

The Clerk: Yes, your Honor. It has been [18] marked A1 for identification.

Mr. Morrow: As a matter of fact, your Honor, it appears that the document appears in the part of the application or at least it's on the back of the application but it is a separate document.

The Court: This is a printed form. On one side is the application for the insurance and the other side the doctor's medical report.

Mr. Morrow: Yes, your Honor.

The Court: Is it stipulated to be genuine as to what it purports to be?

Mr. McManus: Yes, your Honor.

The Court: Received in evidence as Defendant's Exhibit A1.

(The document referred to, marked Defendant's Exhibit No. A1, was received in evidence.)

Mr. Morrow: I wish to read briefly——

The Court: You may proceed.

Mr. Morrow: Yes, your Honor. I wish to read

briefly from Defendant's Exhibit A which is the application which has just been admitted in evidence, application for insurance dated April 14, 1954, and purporting to be signed by George E. Gorey, as applicant. There are a number of questions and answers on this application. I will read two or three at [19] this question. Question 54 "Have you ever had any ailment or disease of (a) Brain or nerve system." The form is answered "Yes or no." The answer is "No." 54 (b) "Have you ever had any ailment or disease of heart or lungs." The question is "Yes or no." The answer is "No." Question 54—strike 54. Question 60. "State names and addresses of physicians you have ever consulted and give the information by reference to question numbers and letters above." Answer "None." Part 6 of the application reads as follows above the signature of George E. Gorey. "On my own behalf and in behalf of any person who may have or claim any interest in any policy issued hereon, (1) I hereby declare that each of the statements contained herein is full, complete and true without exception unless such exception is noted; (2) I hereby agree that except as provided in the receipt referred to in item 63, the proposed contract shall not be effective until the policy has been issued, the first premium actually paid and accepted by the company and the policy delivered to and accepted by me during the lifetime and good health of the person or persons upon whose death a policy benefit mature; (3) I hereby agree that no statement has been made or information given in

connection with this application which is in any way inconsistent with anything appearing herein or in the above mentioned receipt; (4) I hereby agree that only the president, the vice-president, the secretary or an assistant [20] secretary of the company in writing has the power to waive, alter or modify this application or any policy issued pursuant thereto; (5) to the extent permitted by law I expressly waive on behalf of myself or any other person all provisions of law forbidding any physician or other person who has attended or examined the proposed insured or may hereafter attend or examine the proposed insured from disclosing any knowledge or information thereby acquired and I hereby specifically authorize all such persons freely to communicate their knowledge to the company if it requests them to do so." There are other provisions following that but I do not believe that they are material. Therefore, I will not continue further at this time. And as I stated, the document is dated April 14, 1954, signed and dated at Whittier, California, signed George E. Gorey, applicant. I shall read briefly from Defendant's Exhibit A1. I believe it has the stamp of the clerk on the back.

The Court: Yes, the doctor's certificate.

Mr. Morrow: Doctor's report. It's entitled "Medical Examiner's Report to the National Life and Accident Insurance Company. (1) In connection with proposed application for insurance referred to on the reverse side hereof, I hereby certify that I am the person on whose life it is submitted." Signature of the proposed insured, signed "George E.

Gorey." There are a number of questions shown on this exhibit. I [21] shall refer to only one. Question 8(f) "Has proposed insured ever undergone an electrocardiogram." In parenthesis "Give details." The answer is "No." And then there is a certificate at the bottom reading as follows: I certify that I have examined George E. Gorey, Whittier, California, in private at my office this 20th day of April, 1954 for life insurance on his or her life and that proposed insured signed in my presence." Signed S. H. Groff, M.D. Dr. Kerchner, will you take the stand, please.

DR. R. R. KERCHNER, SR.

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: R. R. Kerchner.

Mr. Morrow: I wonder whether I might turn this lecturn around, your Honor.

The Court: Yes, any way.

Direct Examination

Q. (By Mr. Morrow): Where do you reside, Dr. Kerchner? A. Montebello, California.

Q. And what is your home address?

A. 148 North 12th Street.

Q. And you have an office address?

A. 149 North Sixth Street. [22]

Q. The same city? A. The same city.

Q. You are licensed by the State of California to practice medicine? A. I am.

(Testimony of Dr. R. R. Kerchner, Sr.)

Q. And when were you licensed? A. 1936.

Q. Are you licensed to practice medicine in any other state besides California? A. I am.

Q. In what state? A. State of Ohio.

Q. When were you licensed to practice in the State of Ohio? A. 1929.

Q. Will you state whether or not you practiced medicine continuously at all times when you were admitted in the State of Ohio?

A. I practiced until I moved to California in 1936 from the State of Ohio.

Q. And thereafter you continuously practiced medicine in the State of California?

A. That's right.

Q. Will you state briefly what medical societies you belong to, Doctor, if any. [22a]

A. American Medical, California State Medical Association, Los Angeles County Medical Association, American Academy of General Practice, State Academy of General Practice, the County Academy, American Geriatrics Association, a few others that I can't recall just now.

Q. You are now engaged in the practice of medicine in Montebello, are you? A. I am.

Q. You were acquainted with George Edwin Gorey of Whittier, California, now deceased?

A. I was.

Q. How long were you acquainted with Mr. Gorey before his death? I might say he died in November '55.

A. I had known him for several years and I de-

(Testimony of Dr. R. R. Kerchner, Sr.)

livered his first baby for him. I can't tell you just what the age of that child is now, some 10 or 12 years, I guess. Not medically I didn't know him because I never treated him for any medical troubles until 1953.

Q. Then as I understand it, Mr. Gorey consulted you professionally at one time?

A. That's right.

Q. That was in October 1953?

A. That's right.

Q. Was that the first time Mr. Gorey had ever consulted you professionally? [23]

A. Yes.

Q. Did you make any notes or memoranda pertaining to that consultation in October 1953?

A. I did.

Q. Do you have them with you?

A. I have.

Q. Would you have to refer to the notes in answering some questions about the consultation?

A. Yes.

Q. What was the date of the first consultation of Mr. Gorey, Doctor?

A. October 21, 1953.

Q. And what complaint, if any, did Mr. Gorey have or make to you during the first consultation on October 21, 1953?

A. His complaint was pain, feeling of numbness particularly in his left arm. Upon heavy work and he was working around his place of occupation as a carpenter, climbing and things like that produced

(Testimony of Dr. R. R. Kerchner, Sr.)

excessive exertion would cause him to have this numbness and pain and that was what he was concerned about.

Q. Do your notes or memoranda show he had a pain anywhere other than his arm?

A. No, no, it did not.

Q. Do you recall whether or not he gave you a history of having had pain in his chest? [24]

A. He did. Symptoms of angina is what I thought. It was not of the chest but symptoms of angina means pain over the chest.

Q. Is it your recollection, then, that he complained of a pain in his chest at that time?

A. Yes, that's right.

Q. Approximately how long had Mr. Gorey had these complaints before the time he came for the consultation?

A. Just as I recall, I don't have specifically the day, but he started having this pain, as I recall it, it was approximately a month to six weeks prior to his coming to the office.

Q. And how many times did Mr. Gorey consult with you professionally about that complaint?

A. Three—two times other than that first time.

Q. In other words, a total of three times?

A. Three times.

Q. In regards to that complaint?

A. That's right.

Q. What were the dates of the other consultations in regard to that complaint, Doctor?

A. October 27, 1953, and October 31, 1953.

(Testimony of Dr. R. R. Kerchner, Sr.)

Q. Were the consultations held in your office in Montebello? A. They were. [25]

The Court: Does the record show the age of the deceased at that time?

The Witness: He was 31 at that time.

The Court: 31?

The Witness: 31, yes, sir.

Mr. Morrow: I believe the application for insurance also shows the same, your Honor.

Q. On October 21, 1953, you obtained, as I understand it, from Mr. Gorey his medical history?

A. That's right.

Q. And you have already given us at least some of the medical history? A. Yes.

Q. That he gave you at that time?

A. That's right.

Q. Was there any other complaint or history that he gave you other than what you have already stated at that time?

A. Would you please state that question again?

Mr. Morrow: Would you read the question, Miss Reporter.

(The requested portion read.)

The Witness: No.

Q. (By Mr. Morrow): Did you obtain Mr. Gorey's medical history for the purpose of diagnosing his complaint? A. I did.

Q. And also treating his complaint, if that were [26] necessary? A. That's right.

Q. Did you make any physical examination of Mr. Gorey in October '53? A. I did.

(Testimony of Dr. R. R. Kerchner, Sr.)

Q. What examination or examinations did you make?

A. October 21 I made a complete physical examination from head to foot, as I usually do, eyes, ears, nose, throat, heart and lungs, stethoscopic examination, heart and lungs, abdomen, reflexes, prostate gland, urine test and so on, just general physical.

Q. As I recall you stated that the next consultation was on October 27, 1953?

A. That was his next visit to the office.

Q. You requested him to come in for that consultation, did you? A. Yes, sir.

Q. For what purpose?

A. For the purpose of getting an electrocardiogram and chest X-ray.

Q. And was an electrocardiogram and chest X-ray taken of Mr. Gorey on October 27, 1953?

A. It was.

Q. Have you brought with you, Doctor, the electrocardiogram that was taken of Mr. Gorey on that day? [27] A. I have.

Mr. Morrow: I believe you examined the document, Mr. McManus?

Mr. McManus: Yes.

The Court: Any objection to the offer?

Mr. McManus: No objection to the offer.

The Court: Received in evidence, Defendant's Exhibit B, Mr. Clerk.

The Clerk: Defendant's Exhibit B has previ-

(Testimony of Dr. R. R. Kerchner, Sr.)

ously been marked for identification, your Honor, and also offered.

The Court: I don't know whether they intend to use these two or not. This will be D.

Mr. Morrow: I haven't kept track as I should, Mr. Normandin. I believe it's C but I am not certain. We have only introduced, I believe, your Honor, A and A1 which are the application and medical report on back of the application.

The Court: You wish this one electrocardiogram marked D?

Mr. Morrow: I believe it would be proper to mark it B, if that meets with your Honor's approval.

The Court: The clerk has B marked for identification.

Mr. Morrow: D would be the next in order, then.

The Court: If you wish.

Mr. Morrow: That will be agreeable, your Honor.

The Court: Received in evidence. [28]

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Morrow): After taking the electrocardiogram and the chest X-ray of Mr. Gorey, did you make any diagnosis of his condition?

A. I made a tentative diagnosis of coronary insufficiency, coronary heart disease. I was not thoroughly satisfied without consultation. I sent it to a specialist, electrocardiographer for consultation.

(Testimony of Dr. R. R. Kerchner, Sr.)

Q. As I understand it you sent the electrocardiogram then to a specialist for his opinion?

A. That's right.

Q. Who was the specialist, Dr. Kerchner?

A. Dr. Travis Windsor.

Q. He is a medical doctor? A. M.D.

Q. What is his specialty, if any?

A. His specialty is heart, cardiac disease and electrocardiography.

Q. And by cardiography, what does that mean?

A. Science, the study of electrocardiographic tracing.

Q. Reading and interpreting such tracings?

A. That's right.

Q. Did you receive from Dr. Travis Windsor a report or an opinion? [29] A. I did.

Q. Of Mr. Gorey's condition? A. Yes.

Q. And you have the original report or opinion with you? A. I do.

Mr. Morrow: We offer the same as an exhibit next in order for the defendant, your Honor. I believe it's stipulated, is it not, Mr. McManus, that the document is genuine?

Q. Do you have the document, Doctor?

A. M*y*?

Q. Yes? A. Yes, the original.

The Court: Have you seen it, Mr. McManus?

Mr. McManus: I am not sure I have seen this one.

The Court: It will be marked Defendant's Exhibit E for identification.

(Testimony of Dr. R. R. Kerchner, Sr.)

Mr. Morrow: I believe the statement, the preliminary statements—I will stipulate that that is a true copy of the—not a true copy but it is the original report and that the same may be admitted in evidence without the necessity of calling Dr. Windsor.

Mr. McManus: There is no objection to it.

The Court: Very well, pursuant to stipulation it is received in evidence as Defendant's Exhibit E.

(The document referred to was marked Defendant's Exhibit E for identification.)

Mr. Morrow: The document is very short. May I read it, your Honor?

The Court: You may.

Mr. Morrow: At the top, Travis Windsor, FACP, with his address in Los Angeles. "Electrocardiograms of Mr. George E. Gorey taken October 27, 1953. Description: Atrial and ventricular rate 70 beats per minute. P-R interval 0.16 second. QRS interval 0.07 second. Interpretation. Tracing is normal before exercise. However, after exercise negative ST. segment shifts in V4 are present. Those are very strongly suggestive of coronary insufficiency. This is an unusual situation for a boy of 31 years." Signed "Travis Windsor, M.D."

Q. Dr. Kerchner, when did you receive that document back from Dr. Windsor?

A. I don't have the date I received it. Some two or three days later.

Q. Was that before the last consultation you had with Mr. Gorey?

(Testimony of Dr. R. R. Kerchner, Sr.)

A. Yes, that was before October 31.

Q. 1953? A. '53.

Q. And after receiving the report from Dr. Windsor, did [31] you make a final diagnosis of Mr. Gorey's condition?

A. I did.

Q. What diagnosis did you make at that time?

A. I made a diagnosis—while he was present I made the diagnosis of coronary heart disease of probably not too severe, that is, too far advanced, but there was no way of telling that to him definitely but I explained to him he did have this trouble and prescribed for him a regime of lighter work, less forceful exercise, discontinuing smoking and overeating perhaps, anything that might produce increased rate of the heart which would likely bring on the pain which he experienced and which would cause him perhaps trouble.

Q. If I may interrupt you, did you explain to Mr. Gorey on October 31 or at least one of the visits your diagnosis was as you have prescribed?

A. I did.

Q. Will you explain briefly in so-called layman's language what coronary insufficiency means.

A. Coronary insufficiency means an insufficient amount of blood coming from the aorta through the coronary arteries. There are two arteries, one left and one right that encircle the heart coming over the top and around the heart that supply the blood to muscle of the heart which enables it to beat and when the heart does not supply enough blood or

(Testimony of Dr. R. R. Kerchner, Sr.)

the blood is not able to get through these arteries sufficiently then [32] pain develops because the muscle does not have enough oxygen which comes by way of the blood stream. That's coronary insufficiency.

Q. As I understand it, you diagnosed his condition as coronary artery disease?

A. Yes, that's what produces coronary insufficiency, coronary artery disease.

Q. Is there another medical term for that type of coronary artery disease?

A. Arteriosclerosis is the technical name, hardening of the arteries, hardening of the coronary arteries.

Q. It's coronary—— A. It's arteriosclerosis.

Q. It's coronary arteriosclerosis?

A. That's right.

Q. Did the electrocardiogram tracing in your opinion confirm your tentative diagnosis that Mr. Gorey was suffering from that condition and disease? A. It did.

Q. Were you aware in October, 1953, that Mr. Gorey was in the business of building and developing tracts?

A. I knew he was a carpenter in the building trade.

Q. And as I understand it, you advised him to lessen his physical activity? A. I did. [33]

Q. Did you prescribe any other treatment for him at that time?

A. I gave him a prescription for nitroglycerin

(Testimony of Dr. R. R. Kerchner, Sr.)

tablets to carry with him to be used as needed. If he developed a severe pain that lasted longer than just a few seconds, to take a nitroglycerin tablet under the tongue and I also advised him to come in in six months for another repeat electrocardiogram or before if his condition became more severe.

Q. Did Mr. Gorey consult you after October, 1953, with reference to that particular complaint or disease, namely, coronary arteriosclerosis?

A. He did not.

Q. Did he consult you professionally after October, '53 for any other complaint? A. He did.

Q. Will you state the dates, please, and what the complaint was.

A. In March of 1954 he had an injury at work. He sprained his knee twisting while working and we had to aspirate his joint. He had hematosis or hemorrhage in the knee joint cavity. We had to withdraw blood from his knee. He was in three or four times, discharged April 7, March 24 to April 7 for the specific condition. On August 15, 1954, was the last I saw him professionaly at which time he was complaining [34] of occipital headaches. Nothing about the heart at all. I prescribed niacin tablets for relief of his headache. I have one here. If not relieved, temporarily relieved at least with these tablets, he was to consult a neurologist for a further study from a neurological standpoint, which was a study of the nervous system.

Q. That's the last time you saw him professionally?

(Testimony of Dr. R. R. Kerchner, Sr.)

A. That's the last time I saw him, that's right.

Q. Dr. Kerchner, I have before me a certified copy of the death certificate of George E. Gorey dated November 21—strike that—it says it was received by the local registrar November 21, 1955, showing date of death November 19, 1955, 7:30 a.m. The certificate states "Disease or condition directly leading to death, (a) Acute Myocardial infarction; antecedent disease due to (b) coronary arteriosclerosis." Will you state briefly what acute myocardial infarction is, Doctor.

A. That is death of a portion of the heart muscle that is supplied by a branch or branches of the coronary artery that comes to that region and sometimes this branch is a large one, sometimes a small one. The injury involved is usually a ccomplete death of the muscle with a development of scar tissue. If healing takes place, the patient survives. Infarction is a permanent thing. That muscle is dead. It never—the muscle cannot, doesn't regenerate. [35]

Mr. Morrow: Nothing else at the moment, your Honor. Just a moment, your Honor. No further questions, your Honor.

Cross Examination

Q. (By Mr. McManus): Dr. Kerchner, you prescribed nitroglycerin tablets for the patient. You don't know, however, whether he ever took one of those pills, do you?

A. That's right, I don't know that he did.

(Testimony of Dr. R. R. Kerchner, Sr.)

Q. And when you advised Mr. Gorey as to his physical condition, especially concerning his heart, did you tell him in lay terms or did you tell him in medical terms what was wrong with him?

A. I told him lay terms. I am certain of that.

Q. And when you testify in court now, are you able to recall all of this which occurred some two or three years ago from your own memory or are you testifying only from your records?

A. No. What do you mean, what part of this testimony, what I just now talked with you or with Mr. Normandin?

Q. The testimony which you have given this afternoon from the stand, is that——

A. The majority—the major portion of it is from the record. As to what words I spoke to him, I am just recalling from memory the essential part, like the advice I gave him, I gave him about advising him to stop smoking and [36] reduction of exercises and so on I have recorded but a large part of the things like description, what I told him about his heart, I am recalling just from memory only.

Q. You are able to recall now at this time what you told him?

A. I only because I do it to other people. I tell everybody. I have practiced the same with him as I have with others. I do not specifically recall that I showed him pictures of the heart but I show it to people who have this trouble, explain it to him.

Q. What I am trying to get at, Doctor, is not how you treat your other patients but how you

(Testimony of Dr. R. R. Kerchner, Sr.)

treat this particular patient, if you can remember of your own knowledge now what you told him at that time.

A. No, I can't remember exactly the words that I told him.

Q. But you do recall, do you, tell him that his condition was not too far advanced?

A. That's right.

Q. Is that your testimony? A. That's right.

Q. And, as a matter of fact, you never can tell a heart patient that his condition is really bad, can you, Doctor?

A. That's right. We have to be very careful because of creating a neurosthenia or a cardiac invalid. The patient [37] is sometimes so worried about their heart, they then will have to be an invalid or their family will have them sick all the time, that they actually will feel sick. So we actually have to be very careful the way we tell them about it. Sometimes we can't even tell them. It is very very bad for them to give them that. It is a hardest thing to tell a patient exactly even if we know it. The electrocardiagram cannot always show exactly how severe this trouble is. It might have been very severe at that time. It might not have been, because the record only showed that he had this trouble after he exercised. If he hadn't exercised, we wouldn't know he had it at all.

Q. And the electrocardiogram is not always correct, is it, then?

(Testimony of Dr. R. R. Kerchner, Sr.)

A. If it is positive, yes, but negative the electrocardiogram isn't always correct.

Q. What I had reference to, Doctor, was the statement of Dr. Travis in which he said that the electrocardiogram was strongly suggestive of coronary insufficiency. Wouldn't that indicate that he wasn't positive that that was what was wrong with him?

A. Well, I don't know what Dr. Windsor had in mind other than what he stated there himself that you read from. I haven't talked with him about it. Of course, you have to know laboratory work is used in conjunction with clinical [38] findings, the history of a patient taken all combined to make a diagnosis. But the electrocardiogram is a pretty good thing. It has been pretty well established through all medicine that it is a safe thing to go by in the majority of cases at least.

Q. In the majority. In other words, it could on occasion be wrong, if possible?

A. It wouldn't be as pronounced. It wouldn't show up only on exercise. If he didn't have coronary artery disease, he would not have developed the findings, the segment shifts on exercise. I will have to say that was a positive finding. I don't think there is any question.

Q. You did advise another electrocardiogram?

A. Yes.

Q. After another six months?

A. That's right.

Q. Did he come back for an electrocardiogram?

(Testimony of Dr. R. R. Kerchner, Sr.)

A. No.

Q. He did come back to see you, though, professionally, did he not? A. That's right.

Q. At that time did he make any complaint concerning his heart condition? A. No.

Q. He did come back about six months after you first [39] saw him in October?

A. Let's see, October to March. That was about five months. May I say a word?

Q. Yes.

A. I saw George quite a number of times. I liked him very much. He was a nice fellow. We had him do quite a bit of work around the office, small jobs in carpentry work when he was off his own job and also at the house. He always acted perfectly all right. He never complained at all about his heart hurting him while he was around us. My wife saw him at the house and I saw him at the office. So personally, I—he was a fine, honest fellow as far as I could ever tell.

Q. Apparently he did the carpenter work for you. Was that after October '53?

A. Yes, yes. Oh, yes, all of this—the first time I saw him for years was October, 1953.

Q. How much after October, 1953 did he do the carpenter work for you?

A. I went to the hospital myself for quite a long stay in the hospital, about six weeks in October, '55. So I never saw him after that.

Q. Yes. What I have reference to, Doctor, was

(Testimony of Dr. R. R. Kerchner, Sr.)

he doing carpenter work for you immedately after October, 1953?

A. Well, I don't—I can't tell you whether it was a month after or—but many times—I will say 1953 [40] followed '53, '54 and '55, yes. I can't tell you how many times.

Q. Now, you said on direct examination that you advised for him to cut down on his exercises?

A. That's right.

Q. You mean at work or——

A. At any place. You remember I said excessive exercise or over-exercises.

Q. Oh, you told him to cut down on over-exercises? A. That's right.

Q. Not normal exercise? A. No.

Q. And the work which he did for you, you considered that to be not over-exercise?

A. That's right.

Q. Didn't you? A. That's right.

Q. And that wouldn't hurt him, would it?

A. No. Part of his livelihood.

Q. And you have nowhere in your notes, do you, Doctor, that Mr. Gorey ever lost any time from his work on account of his heart, do you?

A. No, I do not.

Q. And you don't remember him ever having told you he lost any time from that work, do you?

A. No, that's right, he never mentioned his heart as far as I can recall after 1953.

Q. Now, while you have stated, Doctor, that you advised him of his condition, do you think that it

(Testimony of Dr. R. R. Kerchner, Sr.)

is possible, perhaps, he did not recognize his true condition?

Mr. Morrow: Just a minute, objection, your Honor, calls for a conclusion and is argumentative.

The Court: Sustained.

Q. (By Mr. McManus): Could I see your notes, Doctor? A. My history notes, you mean?

Q. Yes. A. (Indicating.)

The Court: Just a single card?

The Witness: Yes.

The Court: Let it be marked as Plaintiff's Exhibit 3. Is it?

The Clerk: Yes, your Honor, or is it 2?

The Court: Yes, 3, Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

The Court: It has not been offered in evidence, Mr. McManus.

Q. (By Mr. McManus): Doctor, on your notes I notice under date of November 28, 1955, the patient——

Mr. Morrow: Just a minute, counsel. I object to your [42] reading notes of November, '55 as the doctor did not refresh his recollection of anything that occurred after, I believe it was August of 1955 —of '54. I believe I am correct in stating that, your Honor.

Mr. McManus: Well, I am going to strike that question, your Honor.

Q. Now, I believe you told us on direct examination, Doctor, that in August, 1955, Mr. Gorey com-

(Testimony of Dr. R. R. Kerchner, Sr.)

plained of occipital headaches and that you prescribed medicine for him, is that correct?

A. That's right.

Mr. Morrow: May I interrupt a moment, your Honor. I believe August, 1954. Is that correct?

Mr. McManus: Isn't that what I said?

Mr. Morrow: You said '55, I believe.

Mr. McManus: '54, then.

Q. Now, did he make any complaints to you at that time concerning his heart?

A. So far as I can remember, he did not make any complaints of his heart after I last saw him and he had his consultation on October 31, I believe it was, in 1953, I don't think he ever said anything about his heart.

Q. And what kind of examination, if any, did you give him in August, 1954?

A. That, I don't remember. I know my notes are very [43] brief. I was ailing at the time and couldn't much practice. I couldn't do a great deal of detail writing.

Q. You don't remember whether you actually examined his heart at that time or not?

A. No, I don't recall. Anyway, coronary heart disease cannot be heard by stethoscope anyway.

Mr. McManus: I believe that will be all, Doctor.

Mr. Morrow: No further questions, your Honor.

The Court: You may step down, Doctor. Next witness.

Mr. Morrow: The Doctor may be excused?

Mr. McManus: Yes, he may be excused.

The Court: Now, the Doctor's notes here have been marked for identification as Exhibit 3. If both sides agree that they may be withdrawn——

Mr. Morrow: It is perfectly agreeable with the defendant.

Mr. McManus: I would like to offer them in evidence.

Mr. Morrow: We would object to the receipt in evidence. They were only used to refresh his recollection; counsel was given the opportunity to cross examine the doctor on all dates and matters in question. We object to——

The Court: Overruled. They will be received in evidence, Exhibit 3.

Mr. Morrow: Furthermore, may I be heard on another ground.

The Court: You may state another ground.

Mr. Morrow: The other ground is that the notes have to [44] do with not exclusively Dr. Kerchner, Sr. There are some notes down there by Dr. Kerchner, Jr.

The Court: That doesn't appear in the record here so far as I recall. The Doctor identified them as his notes. We have the testimony of the Doctor as being his notes. I don't recall hearing any mention of anyone else.

Mr. Morrow: Might I, before you affirmatively rule, recall Dr. Kerchner to clarify that question?

The Court: Any objection?

Mr. McManus: No, I have no objection.

The Court: You may.

Mr. Morrow: Will you take the stand again, please, Doctor?

The Court: Exhibit 3.

DR. R. R. KERCHNER, SR.

recalled as a witness on behalf of the defendant, having been previously duly sworn, testified further as follows:

Redirect Examination

Q. (By Mr. Morrow): You have your notes before you, Dr. Kerchner? A. I do.

Mr. Morrow: Exhibit 3, is it, Mr. Clerk?

The Clerk: Yes.

Mr. Morrow: For identification.

Q. Dr. Kerchner, there is entered 8/15/54 which you [45] have testified about on your notes. Is that in your handwriting? A. That is.

Q. And is there other handwriting following that date? A. There is.

Q. Is any of the following handwriting in your handwriting? A. It is not.

Q. Whose handwriting is it, if you know?

A. It's my son's, Dr. R. Kerchner, Jr.

Mr. Morrow: If the Court, please, we object to the introduction of the document in evidence on the same grounds, it is not entirely the handwriting of the Dr. Kerchner, no foundation laid showing the value of the material, furthermore, anything stated on there would be purely hearsay.

The Court: Doctor, any testimony you have given of events subsequent to the 1954 dates you mentioned, you looked at Exhibit 3 and refreshed

(Testimony of Dr. R. R. Kerchner, Sr.)

your recollection from your notes of entries made by yourself, have you relied upon entries made by yourself?

The Witness: Yes, sir.

Mr. Morrow: May I examine the Doctor further on that matter?

The Court: You may.

Q. (By Mr. Morrow): Doctor Kerchner, as I understand you to say, you refreshed your recollection on the notes on [46] Exhibit 3 for some notes appearing after 8/15/54? A. That's right.

Q. In your testimony of today?

A. You say—I didn't testify about the notes today, no.

Q. Did you incorporate in your testimony today any matter that is shown in handwriting that is other than your own? A. I would hate to.

Q. No, I say, did you?

A. Did I? I did not.

Q. In other words, as I understand you, you refreshed your recollection and testified only from the entries on Exhibit 3 starting 10/21/53 and ending 8/15/54? A. That's right.

Mr. Morrow: If the Court, please——

The Court: You misunderstood me. I asked you if you had relied upon your son's entries in giving your testimony. I understood you to say you did.

The Witness: I beg your pardon. I didn't understand it. No.

The Court: Your testimony is you did not refresh

(Testimony of Dr. R. R. Kerchner, Sr.)

your recollection, any part of your recollection, from any entries made by your son?

The Witness: That's right.

Mr. McManus: May I ask a question, your Honor? [47]

Recross Examination

Q. (By Mr. McManus): Doctor, will you state the name of the doctors who are in your office?

A. At the present time?

Q. At the time that these notes were made.

A. R. Kerchner, Jr. and myself.

Q. And yourself? A. And myself.

Q. And were these notes made in the regular course of your business?

A. All of them? You are speaking of all the notes now?

Q. I am speaking about all the notes.

A. All the notes——

Mr. Morrow: Just a minute. I object. It calls for a conclusion so far as any other notes have been made, your Honor, except the ones Dr. Kerchner, Sr. made.

The Court: Overruled. You may answer.

The Witness: The notes that I made myself here are all my own and were made in the course of my practice.

Q. (By Mr. McManus): And were the notes which were made by your son made in the course of your general practice?

A. They were. I could vouch for that.

Mr. Morrow: If the Court, please, we renew our

(Testimony of Dr. R. R. Kerchner, Sr.)

objection on the additional ground I have already stated that some [48] of the matters that occur after 8/15/54 would be purely hearsay. I suggest that the Court may examine the notes.

Mr. McManus: Well, I believe that should be admitted, your Honor. I have no objection to the Court examining the notes.

Mr. Morrow: We would be happy to stipulate that the only notes that this witness has testified about, refreshed his recollection be read into evidence. We have no objection to that but there are some hearsay matters that have nothing to do with this case, which we object.

The Court: Well, objection sustained. Exhibit 3 will be marked for identification only. Do you desire it to remain in the record?

Mr. McManus: Yes, your Honor.

The Court: Very well, Exhibit 3 will remain in the record as a record of excluded evidence, 3.

Mr. Morrow: We renew our offer that we have no objection to the reading of the items 10/21/53.

The Court: Offer was made of the entire exhibit.

Mr. Morrow: In addition to that, I offer, if counsel agree in this, we will stipulate that part may be read.

The Court: The offer was of the entire record. I sustained your objection, Mr. Morrow. Any further questions from the doctor.

Mr. McManus: I have no further questions. [49]

The Clerk: I want to keep these exhibits straight.

(Testimony of Dr. R. R. Kerchner, Sr.)
D was supposed to be the electrocardiogram. I don't know where that is.

The Court: Where is Exhibit D, the electrocardiogram?

The Witness: Here it is, right there.

The Court: Exhibit E is Dr. Windsor's report. You have Exhibit 3 marked for identification, the objection of the defendant's counsel being sustained. No further questions of Dr. Kerchner?

Mr. Morrow: No further questions.

Mr. McManus: No further questions.

The Court: You may step down. You are excused. Call your next witness.

Mr. Morrow: We have some sworn documents to offer at this time. I believe we have some of these documents here in our file.

The Court: It might be well to take the afternoon recess at this time while you gentlemen are assembling those matters. Again before we separate, members of the jury, I must admonish you you are not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching upon the merits of the trial, not to form or express any opinion on the case until it is finally submitted to you for your verdict. I will excuse you for five minutes.

(Whereupon a short recess was taken.) [50]

The Court: Is it stipulated, gentlemen, that the jury is present?

Mr. Morrow: Yes, your Honor.

Mr. McManus: Yes, sir.

The Court: You may proceed.

Mr. Morrow: Call Mr. Smith, please.

LAWSON W. SMITH

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: Lawson W. Smith.

Direct Examination

Q. (By Mr. Normandin): Where do you reside, Mr. Smith? A. 415 Divester Drive, Whittier.

Q. What is your occupation?

A. District manager and administrative officer of the district.

Q. Of what company?

A. National Life and Accident Insurance Company.

Q. That is the defendant in this case, is it not?

A. That's correct, sir.

Q. How long have you been engaged in that position with the defendant company?

A. A little over six years. [51]

Q. Mr. Smith——

Mr. Normandin: Pardon me, Mr. Clerk, would you hand Mr. Smith Defendant's Exhibit A?

Q. (Continued) Does the National Life & Accident Insurance Company issue policies on lives of various individuals?

A. Would you repeat that, please?

(Testimony of Lawson W. Smith.)

Mr. Normandin: Read it, please, Miss Reporter.

(The requested portion read.)

The Witness: They do.

Q. (By Mr. Normandin): Before any policies are issued, do you have any jurisdiction over securing applications for the policy?

A. Yes, there is a procedure which we follow in securing applications.

Q. And what is that procedure, Mr. Smith?

A. On the application certain questions are set forth and the proposed insured or the applicant is asked these questions and the information is put on the application as answered by the applicant.

Q. Now, you have before you Defendant's Exhibit A. Is that a form which is used by your company? A. It is, sir.

Q. And for what class of insurance policies is that used? A. For preferred risk. [52]

Q. Calling your attention to the portions on that application, Defendant's Exhibit A, will you state for what purpose part 1 is used?

Mr. McManus: I am going to object to that as calling for a conclusion of the witness.

The Court: In that form I will sustain the objection. Does the form need explanation?

Mr. Normandin: I believe it does, your Honor, with reference to certain particular questions that are included in the application as to the materiality of the particular information that is sought in response to those questions, your Honor.

(Testimony of Lawson W. Smith.)

The Court: You expect to show that this was communicated to the insured, the decedent?

Mr. Normandin: The decedent executed the application.

The Court: Yes, I know, but he might not know what purpose the company had in the certain portion of the form. Unless you expect to connect it up with him, the objection is sustained.

Q. (By Mr. Normandin): Mr. Smith, were you familiar with any matters having to do with the claim which is made by Mrs. Gorey in connection with the application and the policy of insurance, Plaintiff's Exhibit 1?

A. Does this refer to any part of 1? It refers to A-1.

The Court: Exhibit 1 is the policy. [53]

Q. (By Mr. Normandin): Exhibit 1 is the policy.

A. I recall notice of death coming into the office and seeing that proof of claim was completed to forward to our home office.

Q. Do you know whether or not any payment was sent by the home office to you to transmit to the plaintiff, Mrs. Gorey, on that policy?

A. It was, sir.

Q. How much was that?

A. The exact amount I don't recall but I can give it to you in general. It was a refund of all premiums plus interest.

(Testimony of Lawson W. Smith.)

Q. And was that in the form of a check of the company's office at Nashville? A. It was, sir.

Q. Do you know what happened to that check?

A. It was delivered to the beneficiary, Mrs. Gorey.

Q. By whom? A. By myself, sir.

Q. However, you understand, do you not, Mr. Smith, that that check was never cashed?

A. I heard such.

Q. After the issuance of the insurance policy, Plaintiff's Exhibit 1, did you, in your office as the district manager, ever receive any information or communication from Mr. Gorey or anyone else in his behalf, that any of the answers in the [54] original application were not correct?

A. No information or communication was ever received in the district to my knowledge.

Q. Have you made a search of your records?

A. I personally have.

Q. To ascertain whether or not any communication was ever received?

A. I personally checked that prior to the submission of the claim to the home office, sir.

Q. What was the result of your search?

A. It was negative.

Q. Did you personally have any information at all with reference to the matter of Mr. Gorey having been before Dr. R. R. Kerchner in October, 1953? A. Prior to claim, none.

Mr. Normandin: You may cross examine.

(Testimony of Lawson W. Smith.)

Cross Examination

Q. (By Mr. McManus): Mr. Smith, on the exhibit marked A-1, you say that the agent asked questions of the proposed insured and then the agent put the answers down himself?

A. A-1, is that the doctor's statement?

Q. A-1 is the doctor's statement. I see.

A. That's correct.

The Court: Isn't the reverse side A-1 the application? [55]

The Witness: Yes, sir, that's part 4 that is marked Exhibit A, sir. Exhibit A.

The Court: Exhibit A is the original application. That's what you are referring to?

Mr. McManus: That's what I am referring to, your Honor. I am sorry.

Q. Now, referring to Exhibit A, the application, Mr. Smith, did you say on direct examination that the agent asked the questions of the proposed insured and then the agent writes the answers down on the form, is that correct?

A. That's the procedure.

Q. And then after the agent has written all of the answers down, the proposed insured signs the form, is that correct?

A. He is requested to review the questions which he has answered and if found correct, then to sign the application.

Q. And in this particular case you have no information whether or not he was asked to review it or not, do you? A. No, I do not.

(Testimony of Lawson W. Smith.)

Q. Do you know that is Mr. Gorey's signature, though, don't you?

A. Well, I have every reason to believe it is.

Q. And are the answers on that form written in the handwriting of agent Haws, I believe it is?

A. That's correct, sir.

Mr. McManus: Nothing else. [56]

Mr. Morrow: May I have just a moment, your Honor? No further questions.

The Court: You may step down.

Mr. Morrow: At this time, your Honor, we would like to offer I believe they are exhibits B and C for identification. You have seen these, I believe?

Mr. McManus: I believe so.

(The documents referred to were marked Defendant's Exhibits B and C, respectively, for identification.)

Mr. Morrow: We offer the Exhibits B and C for identification in evidence, your Honor.

The Court: What are they?

Mr. Morrow: They are the physician's statement and notice of proof of loss, I believe they are entitled.

The Court: Any objection?

Mr. McManus: No objection.

The Court: Stipulated to be genuine in all respects what it purports to be?

Mr. McManus: Yes.

The Court: There will be received in evidence physician's statement—perhaps I better clarify that.

Is that the company's physician, insurance company's physician?

Mr. Morrow: No, your Honor, Dr. Kerchner who testified a while ago—that particular statement is signed by Dr. Kerchner, Jr., I believe. [57]

The Court: That's the statement made after the death of the insured?

Mr. Morrow: Yes, your Honor.

The Court: In connection with the claim of loss?

Mr. Morrow: Yes, your Honor, was furnished after the insured died by the plaintiff. Is that right, Mr. McManus, furnished to the company?

Mr. McManus: Yes.

The Court: Very well. That is Exhibit B, is it?

The Clerk: No, that's Exhibit C, your Honor.

The Court: Exhibit B is the claim itself, claimant's certificate?

Mr. Morrow: Claimant's certificate, the claim being of the plaintiff in this action. Am I correct, Mr. McManus?

The Court: In other words, Exhibit C is the claim that the plaintiff here presented to the insurance company after the death of her husband, is that correct?

Mr. McManus: Yes, that's correct.

The Court: And Exhibit B is the physician's statement accompanying that claim?

Mr. McManus: Well, B seems to be something that's signed by the plaintiff, Verda Gorey.

The Court: B then, is the claim of the plaintiff and C is the physician's statement, is that it, which accompanies the claim? [58]

Mr. McManus: Yes, that's correct.

The Court: Very well.

Mr. Morrow: I would like to read briefly from the exhibits when they are marked, your Honor.

(The documents referred to marked Defendant's Exhibits Nos. B and C, were received in evidence.)

The Court: Very well, you may.

Mr. Morrow: Reading from Exhibit B, which is entitled notice of claim, proof of death, claimant's certificate, which has been stipulated, I believe, is signed by the plaintiff, Verda A. Gorey, dated November 21, 1955—I will not read the entire document, Question—pardon me just a moment, sir. I will proceed, your Honor. I am sorry for the interruption. Question 5 of the form I just referred to signed by the plaintiff, referring to George E. Gorey, the deceased, the question is "Cause of death," Answer, "Heart attack." On Exhibit C, which is entitled proof of death, attending physician's certificate signed by R. R. Kerchner, Jr., M.D., which it has been stipulated was furnished to the defendant company after Mr. Gorey died in connection with the claim made on his policy, Question 6, "Date of death." "11/19/55." Question 7, "Immediate cause of death," "Myocardiac infarction." Question 8, "Contributory causes of death," "Arteriosclerosis." Question 10, "How long were you the deceased's medical adviser," Answer "This office, [59] (R. R. Kerchner, Sr., M.D.) for 25 months," Question 11, "When were you first consulted for the condition which directly or in-

directly caused death," Answer, "October 21, 1953," Question 12, "Date of your last visit in final illness," Answer, "October 25, 1955," and below that the word "about," Question 13, "Names and addresses of all other attending physicians during final illness," Answer "R. R. Kerchner, Sr., M.D." with his address "149 North Sixth Street, Montebello, California," Question 14, "In your opinion how long did deceased suffer from the disease or impairment," Answer "25 months," Question 15, "Give duration of each contributory disease as accurately as you can using dates," Answer, "Coronary arteriosclerosis 25 months," signed "R. R. Kerchner, Jr., M.D.," dated "11/21/55." Pardon us just a moment, your Honor. I have here a document entitled "Retail Credit Company life report." May I show same to counsel, your Honor? I am not certain he has seen that. We offer this document in evidence, your Honor. It's dated 4/19/54. I understand Mr. McManus has no objection.

Mr. McManus: I have no objection.

The Court: Stipulated to be genuine in all respects what it purports to be?

Mr. McManus: Yes, it is, your Honor.

The Court: Received in evidence, Exhibit F?

The Clerk: Yes, your Honor, Exhibit F. [60]

(The document referred to was marked Defendant's Exhibit F and received in evidence.)

Mr. Morrow: If the Court please, we have a deposition of two witnesses who are officers of the company in the home office and we should like to read same in evidence if it meets with your Honor's

approval. We take it that's the proper way to proceed in that matter.

The Court: Yes. The original is filed?

Mr. Morrow: I believe so, your Honor. Perhaps I should read from the original.

The Court: Yes. Is there any objection to the deposition?

Mr. McManus: No objection.

The Court: They may be received in evidence, then. Are they under one cover?

Mr. Morrow: They are under one cover.

The Court: They will be received in evidence as Defendant's Exhibit G and G-1.

The Clerk: Your Honor, there are four envelopes here each containing a deposition, one deposition, according to the entry.

Mr. Morrow: We can identify which ones we refer to. They are Jack D. Gwaltney and Dr. Lloyd C. Miller, I believe taken August 3, 1956 in Nashville, Tennessee.

The Court: Do you have those, Mr. Clerk?

The Clerk: Yes, your Honor. The date they are taken is [61] not shown on the envelope. It says deposition of Jack D. Gwaltney and Dr. Lloyd C. Miller.

The Court: Will you open that? They are under one cover, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: Which is the first deposition, Gwaltney?

The Clerk: Yes, your Honor.

The Court: That will be received in evidence as

Defendant's Exhibit G and the other is Dr. Miller, is it?

The Clerk: Yes, your Honor.

The Court: It will be received in evidence as Defendant's Exhibit G-1.

(The documents referred to were marked Defendant's Exhibits G and G-1, respectively, and received in evidence.)

Mr. McManus: Now, may the plaintiff have the reservation to make objections when the deposition is read? I understand counsel intends to read the deposition?

The Court: Yes. I understood you had no objection to it. That's the reason I received it in evidence. They will be marked Exhibit G for identification and Exhibit G-1 for identification instead of in evidence.

(The documents referred to heretofore received in evidence as Defendant's Exhibits G and G-1, respectively, were withdrawn from evidence and marked for identification as Defendant's Exhibits G and G-1, respectively, for identification.) [62]

The Court: You may proceed, gentlemen.

Mr. Normandin: (Reading.)

"The Depositions of Jack D. Gwaltney and Dr. Lloyd C. Miller, taken on behalf of the Defendant, at 11:00 o'clock A.M., on Friday, August 3, 1956, at Room 112, National Building, 301 Seventh Avenue, North, Nashville 3, Tennessee, before T. Roy Hix, Notary Public, in and for the County of Davidson, Tennessee, pursuant to the annexed Notice.

"Appearances: For the Plaintiff: (No appearances.) For the Defendant: Walter M. Robinson, Jr., National Building, Nashville 3, Tenn.

"JACK D. GWALTNEY

the first witness, being first duly sworn, deposed as follows:

Direct Examination

"By Mr. Robinson:

"Q. Please state your name.

"A. Jack D. Gwaltney.

"Q. Where do you live, Mr. Gwaltney?

"A. I live at 2133 June Drive, Nashville 14, Tennessee.

"Q. How old are you?

"A. I am 28 years old. [63]

"Q. By whom are you employed?

"A. I am employed by The National Life and Accident Insurance Company, at its Home Office in Nashville, Tennessee.

"Q. How long have you been employed by that Company? "A. Since January 23, 1950.

"Q. What is your present position?

"A. I am a Senior Underwriter in the Ordinary Underwriting Department.

"Q. How long have you been employed in that position?

"A. About two and one-half years, and before that I was a Junior Underwriter in the Ordinary Department.

"Q. What is the general nature and scope of your duties and authority as a Senior Underwriter?

(Deposition of Jack D. Gwaltney.)

"A. My general duties are the underwriting of applications for ordinary life insurance. Underwriting is the selection of risks. My duties include the review of applications made to the Company for the issuance of policies of ordinary life insurance to determine whether the applicant is eligible for the policy he is applying for; and I have authority to approve applications for the issuance by the Company of ordinary life insurance policies up to $10,000.00 principal [64] amount when I determine that the applicant is eligible for the policy applied for.

"Q. During April, 1954, were you engaged in those duties and did you then have such authority last mentioned? "A. Yes.

"Q. I hand you here a document entitled 'Application for Insurance to The National Life and Accident Insurance Company'. Will you state what that document is?

"A. This is the application of George E. Gorey to The National Life and Accident Insurance Company for the issuance of an ordinary life insurance policy on the life of George E. Gorey on the Family Income plan. The application is dated April 14, 1954 and was submitted through our Montebello, California District Office.

"Q. Have you ever seen that document before?

"A. Yes, on April 29, 1954, I approved this application for issuance of the policy of insurance applied for. As that time, there was not attached to it either the slip bearing the case No. 19691 WM, with the following data: 'Gorey vs. National Life,

(Deposition of Jack D. Gwaltney.)

Deft's Exhibit A, No. A Identification' nor the slip bearing the case No. 19691 WM, with the following data: 'Gorey [65] vs. National Life, Deft's Exhibit A-1, No. A-1 Identification'.

"Mr. Robinson: Mr. Reporter, will you affix your initials and this date on this application, and secure and attach to this deposition a photostatic copy of each page of said application?

"(The document referred to was so initialed and dated by the reporter, and a photostatic copy of each page is attached herewith.)

"By Mr. Robinson:

"Q. Now, Mr. Gwaltney, referring to that application, was a policy of life insurance of the type and character applied for ever issued by your Company pursuant to said application? "A. Yes.

"Q. Does that application show the number of the insurance policy which was issued pursuant thereto?

"A. Yes, the number appears in the upper left-hand corner of the inside page, and it is 2081957.

"Q. Did you make any marks on that application?

"A. Yes, in the box on the bottom of the right side of the outside page I circled the words 'Approved' and filled in the date '4/29/54' and my initials 'JDG'. I also made the two symbols 'O' and the letter 'A' in the column under the printed word 'Rating' and I drew [66] a line under the initials 'JDG'. I also placed the numeral 'III' in the column under the printed word 'Code'.

(Deposition of Jack D. Gwaltney.)

"Q. Are said initials 'JDG' your initials?

"A. Yes.

"Q. Does the line under your initials have any significance?

"A. Yes, that line indicates that my action in approving this application was final and that the policy was ready for issue.

"Q. What is the significance of the symbols, letter and numeral, 'O', 'A' and 'III' respectively, which you placed on said application?

"A. The 'O' means that the applicant was given the standard rating on the Life and the Waiver of Premium features; the 'A' means that he was given a rating of 'A' on his double indemnity rider by reason of his occupation as builder, developer and carpenter; and the 'III' refers to the reason for the 'A' rating, which reason is the occupation of the insured.

"Q. What was the occupation of the insured?

"A. The application, the medical examiner's report and the inspection report indicate that he was a builder, developer and carpenter.

"Q. In passing upon this application, what information [67] did you have available?

"A. I had only the statements of the applicant in his application, the information revealed in said application and in the medical examiner's report, and the information revealed in the inspection report.

"Q. When you mentioned 'inspection report', to what did you refer?

(Deposition of Jack D. Gwaltney.)

"A. I referred to the report of the Retail Credit Company relating to George Edwin Gorey, dated 4/19/54.

"Q. I hand you here a document entitled Retail Credit Company, Life Report, Acct. No. 482, dated 4/19/54, showing the name and address of George Edwin Gorey in the upper left portion thereof. Will you state what that document is?

"A. It is what we refer to as an inspection report. It is the report made by the Retail Credit Company to our company concerning George E. Gorey, the insured named in the insurance policy in suit.

"Q. Have you ever seen this document before?

"A. Yes, on or about April 21, 1954. It was received in our Home Office and was referred to me.

"Mr. Robinson: Mr. Reporter, will you affix your initials and this date in the upper right-hand corner of the document and also secure and attach to this deposition a photostatic copy of said document?

> "(Document referred to was so initialed and dated by the reporter, and a photostatic copy of each page is attached herewith.)

"By Mr. Robinson:

"Q. In passing upon and approving the application for the policy on the life of Mr. Gorey, upon what information did you rely?

"A. I relied only upon the statements of the applicant in his application, the information revealed in that application and in the medical examiner's

(Deposition of Jack D. Gwaltney.)

report and the information revealed in the inspection report.

"Q. Assuming the truthfulness of the statements of the applicant in his application, and of the information revealed in that application and in the medical examiner's report, and of the information revealed in the inspection report, was the applicant eligible for the policy of insurance he applied for?

"A. Yes.

"Q. Suppose that the application contained statements that during October, 1953, the applicant had consulted a physician for a pain in his chest and a numbness and tingling of the arm and hand, and that physician diagnosed the condition as coronary artery disease, a type of heart disease, and that the physician [69] had made an electrocardiogram of Mr. Gorey and confirmed his diagnosis, what would have been your action on the application?"

Mr. McManus: I believe I am going to object to that question for the reason that it calls for the opinion of an employee as to what he would have done under certain circumstances and it calls for a conclusion of the witness.

Mr. Normandin: The answer to that, if your Honor please, this witness who is testifying by deposition is——

The Court: It's offered for the purpose of showing what?

Mr. Normandin: Offered for the purpose of showing that had he the facts——

(Deposition of Jack D. Gwaltney.)

The Court: Reliance, is that it?

Mr. Normandin: Relied upon——

The Court: Reliance, is that the purpose?

Mr. Normandin: Yes, your Honor.

The Court: Is reliance in issue here?

Mr. McManus: We have already——

The Court: Is reliance in issue? Have you raised that, Mr. Normandin?

Mr. McManus: Pardon me, your Honor, we have already stipulated, your Honor, that the defendant relied upon the application and upon the medical report and upon——

The Court: Then there is no occasion for this, is there? It's covered by the stipulation. Do you agree there is a [70] stipulation on it?

Mr. Normandin: Well, I understand we entered into a stipulation, your Honor, at the time——

The Court: Objection sustained.

Mr. Morrow: May I confer a moment with Mr. Normandin, your Honor?

The Court: Yes. Is the stipulation reliance both on what was said and what was not said?

Mr. Normandin: I don't believe so. There might be a doubt.

The Court: I reverse the ruling. You may proceed. I will overrule the objection.

Mr. Normandin: I will ask the reporter to read the last question.

(The requested portion read.)

Mr. Normandin: "A. I would have marked the application to indicate that the applicant was not

(Deposition of Jack D. Gwaltney.)

insurable by our Company and would have forwarded it to our Medical Department. In other words, I would not have approved the application for that policy.

"Q. What effect would have resulted had it been known to your Company that the applicant had been diagnosed as having coronary artery disease, a type of heart disease, in October, 1953?

"A. It would have resulted in establishing that [71] he was an uninsurable risk for life insurance by our Company.

"Q. After the issuance of said policy No. 2081957, and during the lifetime of Mr. Gorey, was any communication received by your Company at its Home Office from Mr. Gorey, or any other person, relating to any of the answers to the questions set forth in his application for said policy?

"A. No.

"Q. During that period did you receive or hear of any such communication? "A. No.

"Q. If any such communication had been received by the Company at its Home Office, to whom would the same have been referred to consideration?

"A. To me as the Senior Underwriter who approved and passed upon the application.

"Q. Have you examined the papers, records and files of the Home Office of your Company, and in particular the file concerning the policy in suit, to ascertain whether or not they contain any communication received during the lifetime of Mr. Gorey

(Deposition of Jack D. Gwaltney.)

from him or from any other source, relating to any of the answers to the questions set forth in his application for said policy, or relating to the fact that before [72] applying for the policy, Mr. Gorey had consulted a physician, or to the fact that he had coronary artery disease or heart disease, or that a physician had advised him that he had coronary artery disease or heart disease?

"A. Yes.

"Q. Did you find any such communication?

"A. No."

Then the signature, "Jack D. Gwaltney."

"Sworn to and subscribed before me, this 13th day of August, 1956.

"T. Roy Hix, Notary Public, State of Tennessee at Large.

"My Commission Expires April 23, 1958."

That completes the deposition of Mr. Gwaltney, your Honor. May I continue? The following page contains the deposition, and subsequent pages, of:

"DR. LLOYD C. MILLER

the second witness, being first duly sworn, deposed as follows:

"Direct Examination

"By Mr. Robinson:

"Q. State your name.

"A. Lloyd C. Miller.

"Q. Where do you live, Dr. Miller? [73]

"A. I live at Howell Place, Nashville 5, Tennessee.

(Deposition of Dr. Lloyd C. Miller.)

"Q. How old are you?

"A. I am 57 years old.

"Q. Please state your educational background.

"A. I was graduated from Washington University Medical School, St. Louis, Missouri, in 1925 and was in general medical practice until 1934, when I became Associate Medical Director of the General American Life Insurance Company of St. Louis.

"Q. By whom are you now currently employed?

"A. By The National Life and Accident Insurance Company, at its Home Office in Nashville, Tennessee.

"Q. What is your current position with that company?

"A. I am now Medical Director of that company, having recently been appointed to that position.

"Q. How long have you been employed by that Company?

"A. Since March 10, 1941, when I was appointed Associate Medical Director. I served in that capacity until my recent appointment as Medical Director.

"Q. Then in April, 1954, you were the Associate Medical Director of The National Life and Accident Insurance Company at its Home Office in Nashville, Tennessee? [74] "A. Yes.

"Q. What was the general scope of your authority and duties in 1954 in that position?

(Deposition of Dr. Lloyd C. Miller.)

"A. As Associate Medical Director of the Company in 1954, I had authority to approve or reject applications for the issuance of ordinary policies of life insurance; and my duties included the supervision of underwriting of applications for ordinary life insurance policies, especially medical questions arising in the course of underwriting.

"Q. Did you personally see each application for ordinary insurance submitted to the Company?

"A. No, the applications are first reviewed in the Company's Ordinary Underwriting Department. If the Underwriter to whom the application is submitted determines that the applicant is eligible for the policy applied for, the policy would be approved for issuance without my ever having seen the application. If there was any question whether or not the applicant was eligible for the policy applied for, the application would be referred to me.

"Q. I hand you here a document entitled 'Application for Insurance to The National Life and Accident Insurance Company' on which the reporter has affixed his initials and this date. State whether or not you [75] participated in the underwriting of this application.

"A. No, I did not. This application was approved for issuance by Mr. Jack D. Gwaltney, Senior Underwriter in the Ordinary Underwriting Department of the Company.

"Mr. Robinson: Mr. Reporter, will you secure and file a photostatic copy of each page of that application?

(Deposition of Dr. Lloyd C. Miller.)

"(Photostatic copy of each page of document referred to so filed and attached herewith.)

"By Mr. Robinson:

"Q. Suppose that that application had been referred to you and it revealed that during October, 1953, the applicant had consulted a physician for a pain in his chest and a numbness and tingling of the left arm and hand, that said physician diagnosed the condition as coronary artery disease, a type of heart disease, and that the physician had made an electrocardiogram of Mr. Gorey and confirmed his diagnosis, what would have been your action on the application?"

Mr. McManus: I believe that I will make the same objection to that question as I made to the other one, your Honor, that it calls for the opinion of an employee of the defendant as to what he would have done under certain circumstances.

The Court: This witness does not say he took any action [76] at all on it.

Mr. Normandin: No, except he has authority.

The Court: Yes, I understand, but it never got to him.

Mr. Normandin: That's correct.

The Court: It would be purely speculative.

Mr. Normandin: Might I be heard, your Honor?

The Court: The other witness said he did act upon it. In order to show reliance, he may say what he testified about, with respect to what he would have done under certain circumstances, but this is a witness to whom it never came.

Mr. Normandin: But, if your Honor please, this witness is the one to whom matters of this kind would have been referred had it been disclosed and he is the one who would have the sole power of passing upon the question if the information had been set forth.

The Court: Just the same, it's speculative.

Mr. Normandin: The balance of the deposition, I might state, your Honor, repeats other questions calling for the same type of responses, your Honor, and is made to meet the allegations of the defendant's answer that had it known of the facts as revealed by the testimony itself here today, the Company would not have issued its policy. I might make an offer of proof at this time, if your Honor please, for the record.

The Court: The evidence here in the form of a deposition, [77] Defendant's G-1 for identification and is part of the record.

Mr. Normandin: Your Honor, there are certain exhibits referred to in the depositions and the originals are in evidence, but photostatic copies are attached to the deposition itself. That completes the depositions, your Honor.

The Court: Very well.

Mr. Morrow: If the Court please, we have some interrogatories of the president of the defendant company that perhaps would be—if counsel is willing to stipulate that all of the questions and answers may be read into evidence, I take it it would consume some ten minutes of time.

The Court: Suppose you go ahead. If there is a chance of concluding——

Mr. Morrow: There is a chance of concluding the evidence this afternoon in a few minutes.

The Court: Let's do that.

Mr. Morrow: Very well, your Honor. We just have an office copy. I think it would be safer to read from the original. Do you have that, Mr. McManus? I am not certain this office copy——

Mr. McManus: I have it somewhere here.

Mr. Morrow: I will use my office copy, your Honor, and Mr. McManus may correct me if I am wrong. Reading from the copy, this is the answer of the president of the defendant to plaintiff's interrogatories under Rule 33 in this case. [78]

"State of Tennessee,
County of Davidson—ss."

I might explain possibly to the jury that these interrogatories—questions were asked of the president of the defendant life insurance company by the plaintiff and I propose to read the questions and the answer which were made under oath on the plaintiff's demand.

The Court: It's part of it?

Mr. Morrow: Yes, your Honor.

The Court: Is that so stipulated?

Mr. McManus: So stipulated.

The Court: Very well. You may proceed.

Mr. Morrow: (Reading)

"I, Eldon Stevenson, Jr., the President of Defendant corporation, being first duly sworn, in an-

swer to plaintiff's Interrogatories to President of Defendant under Rule 33, depose and say:

"Interrogatory 1. State whether the defendant, The National Life and Accident Insurance Company ever had in its employ a person named G. D. Haws.

"Answer. Yes.

"Interrogatory 2. If the answer to interrogatory (1) is affirmative, state in what capacity he was employed, the dates of employment, his place of residence at the time of his employment, and his last address of [79] record as shown by the records of the defendant.

"Answer. He was employed by the company as an agent to solicit prospective applicants for insurance and to collect premiums from and service its policy holders. His employment began on April 27, 1953, and terminated November 15, 1954. His place of residence at the time of his employment was 6718 Loch Alene, Rivera, California.

"His last address of record as shown by the records of the defendant is: 525 North Ninth West, Orem, Utah.

"Interrogatory 3. Do the records of the defendant disclose which agent, employee or person obtained the application for life insurance policy #2081957 from George E. Gorey, and if so, what is the name and address of said agent, employee or person.

"Answer. Yes, G. D. Haws. His last address known to the defendant is 525 North Ninth West, Orem, Utah.

"Interrogatory 4. Do you know in whose handwriting or do the records of the defendant disclose in whose handwriting the answers to the questions on the application for life insurance policy #2081957 were made.

"Answer. I do not know in whose handwriting the answers to the questions in the application for said [80] policy were made and the records of the defendant do not disclose this information.

"Interrogatory 5. If the answer to the preceding interrogatory is affirmative in whose handwriting were the answers made, and are the answers in the handwriting of more than one person.

"Answer. I do not know whether or not the answers to said questions are in the handwriting of more than one person.

"Interrogatory 6. On April 30, 1954 what records, information and reports did the defendant have of and concerning the insured, George E. Gorey in addition to the application of George E. Gorey for life insurance, policy #2081957 and the report of the medical examiner, Dr. Sutten H. Groff, M.D.?

"Answer. None other than a report from the Retail Credit Company.

"Interrogatory 7. State whether or not there was any information whatever in the company's possession on April 30, 1954 concerning an illness or disease of George E. Gorey or concerning medical treatment or advice secured by George E. Gorey.

"Answer. There was no information in the company's possession on April 30, 1954 concerning an

illness or disease of George E. Gorey or concerning medical [81] treatment or advice secured by said George E. Gorey, excepting the information set forth in his application for said policy, in the medical examiner's report and in the report of the Retail Credit Company that he had never had an illness or disease, that he had not received any medical treatment or advice and that he had not undergone an electrocardiogram.

"Interrogatory 8. State whether or not there was any information whatever in the company's possession on or before November 18, 1955 concerning an illness or disease of George E. Gorey or concerning medical treatment or advice secured by said George E. Gorey.

"Answer. None other than that referred to and set forth in my answer to interrogatory 7.

"Interrogatory 9. State whether or not there is now in the possession of the defendant any record or information whatever which would indicate that any agent, employee or officer of the defendant or nor before November 18, 1955 may have known or may have had reason to believe George E. Gorey had consulted a doctor, had been ill or had any disease of any kind.

"Answer. There is no record or information in the possession of the defendant which indicates that any agent, employee or officer of the defendant on or before November 18, 1955 knew or had any reason to believe [81-A] that George E. Gorey had consulted a doctor, or that he had been ill or that he had any disease of any kind.

"Interrogatory 10. Do any records of the defendant disclose that George E. Gorey ever had a knee injury or leg injury

"(a) prior to April 30, 1954.

"(b) after April 30, 1954.

"Answer. No, they do not.

"Interrogatory 11. Do the records of the defendant disclose or show that any agent or employee of the defendant knew or had reason to believe George E. Gorey had ever consulted a doctor

"(a) prior to April 14, 1954.

"(b) prior to April 30, 1954.

"(c) prior to November 19, 1955.

"Answer. No, they do not.

"Interrogatory 12. Do the records of the defendant disclose the names of the persons who were present when the application for insurance policy #2081957 was made or executed.

"Answer. There are no records of the defendant disclosing the names of the persons who were present when the said application was made or executed other than George E. Gorey and G. D. Haws. [81-B]

"Interrogatory 13. Was the application for insurance signed in blank by Mr. Gorey, delivered to the defendant, and the answers later filled in by someone else?

"Answer. No, I have no knowledge which would indicate that any such procedure was followed.

"Interrogatory 14. Is there any information or records in the possession of the defendant which would indicate the application was signed after only a part of the questions had been answered, and that

the remaining questions were answered at a subsequent time.

"Answer. No.

"Interrogatory 15. State whether or not there is any information or records in the possession of the defendant which would indicate that any of the answers to the questions in the application were written on it by some employee or agent of the defendant in an office of the defendant after said application had been signed and delivered to defendant.

"Answer. No, there is no such information and there are no such records in the possession of the defendant.

"Dated this 19 day of June, 1956.

Signed "Eldon Stevenson, Jr.," before "Margaret Welsh, Notary Public." [81-C]

May I confer with Mr. Normandin just a moment, your Honor?

The Court: Yes. I want to inquire of you gentlemen with respect to the deposition of Mr. Miller, was it the testimony of Gwaltney that he had authority to reject the application?

Mr. Normandin: No, it was not, your Honor. His testimony was that if any information came——

The Court: He would have to refer it to the medical department?

Mr. Normandin: He would refer it to the medical director.

The Court: I overlooked that, in making a ruling, I reversed the ruling—if my recollection is correct here, Gwaltney's testimony as I now recall it,

was he would merely make some notations on it and send it to the medical department.

Mr. Normandin: That's correct.

The Court: So Dr. Miller was the man who had the final say on it. Is that the record?

Mr. Normandin: That's the record, your Honor.

The Court: Miss Reporter, would you refer to your notes and again read the question——

Mr. Normandin: Shall I read it?

The Court: Yes.

Mr. Normandin: (Reading)

"By Mr. Robinson:

"Q. Suppose that that application had been [81-D] referred to you and it revealed that during October, 1953, the applicant had consulted a physician for a pain in his chest and a numbness and tingling of the left arm and hand, that said physician diagnosed the condition as coronary artery disease, a type of heart disease, and that the physician made an electrocardiogram of Mr. Gorey and confirmed his diagnosis, what would have been your action on the application?

"A. I would have rejected and declined the application.

"Q. Would the policy in suit have been issued by the Company? "A. No.

"Q. Explain the basis of such rejection and declination.

"A. A diagnosis of coronary artery disease within one year prior to the date of the application would mean a material and substantial additional

risk for a life insurance company in issuing a policy on the life of that applicant. The existence of such a disease increases the risk of a premature death to such an extent that the applicant is rendered an uninsurable risk for life insurance by our company."

Then follows the signature of Lloyd C. Miller, "Sworn to and subscribed before me," Mr. Hix, the notary public.

Mr. Morrow: I believe that covers everything. If I might have a half minute?

The Court: Yes, you may. You may reopen. [81-E]

Mr. Morrow: So far as we can ascertain, that's all the evidence the defendant has to offer.

The Court: The defendant rests?

Mr. Morrow: Yes, your Honor, that was, unless you——

The Court: I don't say that under any and all circumstances you may reopen but that if you can do so without prejudice to the other side or counsel think of something overnight they overlooked, I always permit them to reopen. Do you anticipate any rebuttal?

Mr. McManus: I would like to call the plaintiff back.

The Court: Will it be very brief?

Mr. McManus: Quite brief, I believe.

The Court: Very well. You may call her now.

VERDA A. GOREY

recalled as a witness in her own behalf, having been previously duly sworn, testified further as follows:

Redirect Examination

Q. (By Mr. McManus): Mrs. Gorey, did your husband ever complain of any illness prior to his death? A. Just pains in his chest.

Q. And how long before his death did he complain of pains in his chest?

A. About two or three months before.

Q. And would you explain just briefly to the jury what [82] type of carpenter work your husband did.

A. Well, he was, oh, what they call a framer, putting up the structure of the house and mainly what he did at one time he was roofer but just prior to his death that's what he was doing.

Q. And, Mrs. Gorey, do you know whether or not your husband ever took any nitroglycerin tablets preceding his death? A. No, I do not.

Q. Did he take any sort of medicine before his death?

A. Yes, he took some headache pills. At one time he offered me one for my headache. That's why I happen to know that's what they were.

The Court: Did you take it?

The Witness: Yes.

Q. (By Mr. McManus): Did he ever tell you that he had any nitroglycerin tablets in the house or any other place? A. No, he didn't.

Q. And Mrs. Gorey, when were you first aware

(Testimony of Verda A. Gorey.)

that your husband may have had heart trouble?

A. At the time of his death.

Mr. McManus: I believe that will be all.

Mr. Morrow: No questions, your Honor.

The Court: You may step down.

Mr. McManus: Plaintiff will rest, your Honor.

* * * * *

November 14, 1956; 10:20 o'clock a.m.

The Court: Number 19691, Gorey against National Life case, stipulated, gentlemen, that the jury are absent?

Mr. McManus: So stipulated.

Mr. Morrow: Yes, your Honor.

The Court: Gentlemen, have you had an opportunity to go over these proposed instructions?

Mr. Morrow: Yes, we have gone over them, your Honor.

The Court: First we should take up the matter of your motion.

Mr. Morrow: We feel it might be more logical.

The Court: Yes, we might not have to discuss these instructions.

Mr. Morrow: Shall I proceed, your Honor?

The Court: Yes, if you will.

Mr. Morrow: If the Court please, the defendant moves the Court to direct a verdict under Rule 50, F.R.C.P. on all of the evidence in this case on the ground that there is not only no substantial conflict in the evidence but we believe there is no conflict in the evidence of a showing of misrepresentation and

concealment by the assured of material matters. We feel it follow as a matter of law that the plaintiff cannot recover. Specifically, the evidence introduced, the following evidence is not contradicted. First, [89] that the assured signed and delivered to the defendant company the application for insurance dated April 14, 1954. There is no conflict whatsoever in that. Secondly, that the application shows that the assured made false answers to at least two questions, namely, one, whether he had ever had an ailment or disease of the heart, and secondly, if he had ever consulted any physician. I know I don't need to go over the evidence on that. It seems to us to be very clear that there is absolutely no conflict on those matters.

The Court: Let's take one, take the question where he is asked whether he has consulted a physician.

Mr. Morrow: Shall I proceed on it?

The Court: The answer is "No."

Mr. Morrow: Yes, sir, never consulted any physician.

The Court: Assuming that that was his answer and that he knew it was false, or, put it another way, he made an understatement, doesn't there still remain the problem of whether or not the defendant relied on it whether or not the defendant would have issued the policy notwithstanding?

Mr. Morrow: Assuming your Honor is right on that point, the evidence on these matters we feel are—is entirely uncontradicted, overwhelmingly to the effect—that is the law when there is no evidence

that he answered otherwise than "No" to the question on consulting a doctor, and, of course, we realize that the law is if it involves a matter of slight [90] indisposition like a cold or sore toe or something, certainly no court is going to vitiate a policy on that ground. They shouldn't. But when it comes to a material matter——

The Court: We are dealing with whether or not there are any questions for the jury here. The insured is not here. He hasn't been heard from. The agent who wrote the answers hasn't been heard from.

Mr. Morrow: No.

The Court: Now, take that question about consulting a physician here. The jury might decide it isn't the insured's answers.

Mr. Morrow: I don't see how they could, your Honor. I believe the law is very clear that unless some evidence is shown, at least some inference from some acts to be drawn that the man couldn't read or that he didn't sign the policy, why——

The Court: The evidence is here he didn't write those answers.

Mr. Morrow: That's right. The evidence is here that he signed it and he stated he read it.

The Court: Yes, but that under what circumstances? After all, we are dealing now with what inference reasonably may be drawn.

Mr. Morrow: Yes.

The Court: The jury might well draw the inference, [91] might it not, that here this agent was so anxious to sell this policy, while we speak of con-

tracts of insurance, people entering into contracts of insurance, the truth is that the contracts of insurance if sold, the policies are sold, they are not bargain contracts in the sense you use when you speak of contracts. Here is an application that the agent who hasn't been produced wrote the answers. Now the man who gave the answers presumably nor the man who wrote them down has been here. Now, the jury might decide, might draw an inference that this insured wouldn't make an answer such as that to questions such as that about whether he consulted—the question, as I recall, is whether he ever consulted a physician. That means, that's broad enough in the 30 years of his life or 31, had he ever consulted a physician.

Mr. Morrow: That's right.

The Court: That's a very broad question. The jury might well believe in the first place this man was honest. The doctor appearing to testify for the defendant testified without objection this man was a very honest man.

Mr. Morrow: I remember that. I might say that I considered moving to strike that evidence here entirely in retrospect.

The Court: Even without that the jury might draw an inference from all the circumstances that certainly here was a question that no one, certainly very few people, very [92] few people in the United States at the age of 31 could answer "No." I just wonder how many people who can say at the age of 31 that they had never consulted a physician.

Mr. Morrow: I think your Honor is right about

some remote consultation or even a recent consultation, for instance, for a cold. I know I have studied the law on that phase of the matter and I know the cases holding if you have a cold, why, it's presumed the man might forget that. But here we have first of all a very important thing, coronary arteriosclerosis, coronary insufficiency.

The Court: You are talking language that the jury might well believe that this man who is a builder and carpenter didn't know the meaning of.

Mr. Morrow: However, the testimony the doctor gave is he told him he had heart disease.

The Court: That's a matter of opinion, yes.

Mr. Morrow: Further, your Honor, the evidence shows that he visited Dr. Kerchner on April 7, I think it was, 1954, which was approximately a week before he signed this application. It's true he visited him for a sore knee but he did not disclose that and furthermore, he must have had it right fresh in his mind the week before.

The Court: Yes. Supposing the jury decides just exactly that. Then may they not also decide here is an experienced insurance company who see these applications day after day [93] and he was an inexperienced man 31 years of age. The question whether or not he ever in his life had he consulted a physician and he says "None", might not the jury reasonably decide that the insurance company must have known that was probably not true but they relied not upon what he said, relied upon their own medical examiner?

Mr. Morrow: Your Honor, I believe——

The Court: Would they have issued the policy even if they had known the fact?

Mr. Morrow: I don't believe — pardon, your Honor.

The Court: Let's get one thing straight, first. If the company would have issued the policy notwithstanding if the company had known what the insured knew, it's immaterial, isn't it, whether he misrepresented to them or not?

Mr. Morrow: It might be.

The Court: If the company was so anxious to sell insurance that they winked at medical evidence before them, might not the jury decide there was no reliance upon these misrepresentations, or here they might decide it to be, with respect to consultation of physicians, an obvious concealment?

Mr. Morrow: I don't believe so, your Honor. I think the law is in substance, in answer to a direct question, to give it the importance at least which this certainly has. The company is entitled as a matter of law to rely on that.

The Court: Entitled to, but the question is, did it? [94]

Mr. Morrow: Yes, it's stipulated.

The Court: Can you, in your own experience, can you imagine looking at that and reading it and knowing what it means, without reason to question as to whether or not that's true with respect to a man 31 years of age?

Mr. Morrow: Well, I say, your Honor, again that it seems to me that that's a very important matter and he is bound by it. He read it.

The Court: It's a jury question. Isn't it?

Mr. Morrow: I don't think so because the evidence—I don't think the jury would be able to, they might do so, but I don't think the jury is entitled to draw an inference from those facts.

The Court: Would it be beyond the bounds of reason?

Mr. Morrow: Yes, I think so, in the state of the evidence. I think the Court, if a verdict be returned, it would have to set aside the verdict as a matter of law. There is no, just no evidence to the contrary. It can draw an inference but you have got to draw some reasonable inference, it seems to me, unless the line of reasoning goes beyond reasonable inference.

The Court: It's a matter of common knowledge, isn't it, that insurance companies sometimes issue a policy and boost the premiums in the face of admitted medical reasons?

Mr. Morrow: Yes, that's true, I know of a [95] few instances. I have heard of instances where they may take a man over and charge him three times the premium in the light of their own medical examination, the company says, "We won't issue it on a preferred risk, ordinary rate, we will issue it to you at three times the rate," but the evidence shows this is an ordinary rate and contract.

The Court: But in all of these cases, isn't it open to the jury to believe whether or not the company relied——

Mr. Morrow: Stipulated, your Honor, that right's in the stipulation, that the company relied on the

application and the medical report, stipulated by counsel.

The Court: Yes. That isn't the correct—my question, properly phrased, is whether the company would have——

Mr. Morrow: Would have issued——

The Court: ——issued but for it and if the company had known what the insured knew, I take it that if the evidence shows that the doctor asked the insured if he had ever had some Latin phrase that long and the insured said "No" and it later developed that he had had it not only once but a half a dozen times but that he didn't know what the language meant, I take it that that would have not been a misrepresentation?

Mr. Morrow: I think if I were sitting as a Judge and were to decide that question, I would decide it that way.

The Court: Don't we have two factors here? One, to determine what the insured knew, what he [96] understood, and two, what the company would have known—would have done if the company had known as it was entitled to know the facts at least as the insured understood them. They were entitled to good faith answers to the questions according to the understanding of the insured.

Mr. Morrow: Yes. Take——

The Court: Isn't the question then what would they have done with respect to the issuance or non-issuance of the policy if they had known the things that the insured knew or understood?

Mr. Morrow: Or if they had known what he had, had heart disease or coronary arteriosclerosis, if they had known he had consulted a doctor?

The Court: Suppose he did and didn't know it?

Mr. Morrow: He certainly knew he consulted a doctor.

The Court: Many people have been told they had heart disease and they have lived out and have made mockery of the doctor who said it. If he had been told, he understood it was the doctor's opinion that he had heart disease, then the insurance company was entitled to know that.

Mr. Morrow: Certainly.

The Court: If it asked the question which elicited that information.

Mr. Morrow: It did.

The Court: If it showed interest in having [97] that information——

Mr. Morrow: And it did.

The Court: Then doesn't the question—even if you decide that he misrepresented in the sense that he concealed, then doesn't the question still remain, would the company have issued the policy had it known what the plaintiff concealed?

Mr. Morrow: I am not entirely convinced from my study of the law, that is so, but assuming for argument that your Honor is right on that score, I say that the uncontradicted evidence is that the company would not have issued the policy. Now, we have the testimony of the underwriting—senior underwriter and of the chief of the medical depart-

ment and this question, your Honor no doubt recalls, we expressly put to them and they answered they would not have issued this policy.

The Court: That type of thing, that always presents a problem of fact finding in fraud cases, "Would you have entered into the transaction?" "Did you rely?" "Yes, I relied." "Would you have entered into the transaction but for the recommendation?" "No, I would not." You aren't suggesting, because there is no one to take the witness stand to say "Yes," he would have, that the fact finder must find—it isn't like that type of thing, "Where were you on the night of June 12th?" It involves the mental state. It seems to me it's always a problem for the fact finder to state that person is telling the truth when he said what he would have done.

Mr. Morrow: Isn't the law on that subject that unless there is some impeachment of the witness that the testimony of a single witness is entitled to belief or some such wording as the cases say?

The Court: Yes, of course, if that were all in the case, but that's never all that's in the case. That's surrounding circumstances in the case in a fraud case, surrounding circumstances of what kind of a deal was it and all the circumstances surrounding the transaction, perhaps to raise inferences that are reasonable or contrary to this certain fact that the plaintiff would not have entered into the transaction but for reliance. The same way here. Here you have the report of the doctor, the company's chosen medical man. Now, the jury might well find,

assuming a person is correct, wouldn't the company rely upon its own medical man to know as much as Dr. Kerchner found out in this matter?

Mr. Morrow: I think there is a lot to the effect, if your Honor is interested, to the effect that an insurance company has this medical doctor examine the insured before issuing the policy is of no moment.

The Court: It must be of some moment. It may not be controlling, no. The company isn't forced to rely upon that factor alone. The beneficiary cannot come in and effectively say, "Well, you had him examined and you found out yourself." The company is entitled to rely upon those answers to [99] the medical history given by the insured.

Mr. Morrow: Another thing, I think the evidence, so far as you are talking about the medical examiner, the evidence would seem to indicate from the report, that the assured never gave the examiner any of his history. You can see in this type of disease, as Dr. Kerchner stated, you got to take your EKG, your electrocardiogram. You have got to have the man exercise to find nothing wrong with him before he exercised.

The Court: How do we know whether this man even knew what an electrocardiogram was?

Mr. Morrow: Well, he had one taken of him.

The Court: He still might not know what they were doing, what it was. Of course, people who have have it. It isn't an every day word. Supposing—have you ever had a myelogram?

Mr. Morrow: I don't recall it.

The Court: A man says to himself, "I never heard of that one. I am sure I never had the thing." The district manager says that these applicants for insurance are asked to check over these answers and be sure they are correct before they sign. For instance, they usually have asked me about members of my family, what they died of and I tell them what I understand. Would that vitiate the policy if I didn't know what I was talking about, if I said it was angina pectoris and the death certificate showed it was cirrhosis of the [100] liver, would that vitiate the policy?

Mr. Morrow: I doubt it very much.

The Court: They are entitled to rely upon it. It's misrepresentation. Isn't it all that you can expect under the circumstances, is the good faith understanding of the insured as to his medical history?

Mr. Morrow: You mentioned the members of the family business. I think that would come under a different category. All the company can ask for is that the applicant gives his best knowledge of it. He may be wrong but——

The Court: Suppose they asked the man if he ever had an electrocardiogram and he says "No." He thought what was an electrocardiogram was a metabolism test. Wouldn't the situation be the same?

Mr. Morrow: I think it must be presumed that he knew what he was talking about. He was asked the question and it seems to me that where he has had one within the last year——

The Court: I am not suggesting, Mr. Morrow, that these answers are clear. All I am suggesting is that these are inferences which the jury are called upon to draw on the surrounding circumstances and surrounding circumstances do not give them the best evidence. It seems to me they are particularly entitled to draw inferences when as in this case where we don't have the testimony of the assured, we don't have even the agent. There is no explanation here why he wasn't [101] produced, is there? He lives in Utah?

Mr. Morrow: He is in Utah, the evidence shows. I don't think it's incumbent upon the defendant to call the agent no longer in its employ, as the evidence shows. Out of state, you usually take his deposition. It seems to us that if there is to be any point made by the plaintiff that the assured did not understand any of these matters that it's up to the plaintiff to present some evidence to that effect. It's not up to the defendant.

The Court: Well, the jury might so infer. But isn't it a problem for them to draw reasonable inferences one way or the other in the situation?

Mr. Morrow: Yes, that's the rule, but I certainly disagree with your Honor that, if not that all of them, at least that some of them may be arguable. He, however, consulted a doctor, the evidence shows, in October '53, because he had three consultations in regard to his heart. They asked the specific question on the application, "Have you ever had a heart disease or ailment of the heart?" The evidence shows without contradiction this man, within one

week prior to the time he signed his application, he consulted with this very same doctor, and the month before he had consulted with him, true, about different things, but how can you possibly draw an inference that he knew and he deliberately was failing to answer a direct question on that point? I agree with you [102] if it had been three years or ten years before or some minor thing, I think the state of the law should say it doesn't make any difference because it's not material and consequently I think a jury might well infer that he didn't have it in his mind and therefore he is not misleading the company on any material matter. We got something so fresh, it must have been fresh in his mind. It calls for an answer, "Yes, I have," and give the particulars that the application says, "Give the particulars," and he answers "None." Now, he might have had a loss of memory or something to be polite about it, but this defendant isn't charged with that. It's the man's obligation. Just take that one thing. You can argue all you want about heart disease and other matters, how can you infer on that one thing, it's a very important thing, that the jury would be entitled to draw an inference that he did not know what he was being asked or any other inference.

The Court: Let's assume they would. Wouldn't they be entitled to draw an inference you must have known that that answer was probably not true, not correct, and the company nonetheless just relied upon its own medical report and issued the policy?

Mr. Morrow: And I think as a matter of law the company is absolutely entitled to rely on it.

The Court: The question is, did they? Isn't that a question for the jury, did they rely to the [103] extent that they would never have issued the policy but for that?

Mr. Morrow: That's uncontradicted evidence, uncontradicted evidence all the way down the line. It's so important. It's not an unimportant question, your Honor.

The Court: No, it's a very important thing. It involves the state of mind. It is in my view always a question for the jury as fact finder.

Mr. Morrow: I think he is presumed to have had that in mind, at least anything as recent——

The Court: Let us assume the jury finds that was a flagrant misrepresentation. Might not the jury also find anyone would know that probably wasn't true and this company, experienced in handling these matters day after day, must have known it wasn't true? They raised no question about it and they went ahead and issued the policy notwithstanding. They couldn't rely upon it to the extent that it influenced them in issuing the policy.

Mr. Morrow: I disagree with your Honor on that because I think the law is very clear that it's a matter of law on a matter like, not have been up to the jury to consider. I think it's a matter of law and it has been ruled on in many cases in similar matters.

The Court: I will deny the motion at this time.

You may renew it after the verdict if you find it necessary. * * * * * [104]

Thursday, Nov. 15, 1956, 9:30 A.M.

* * * * *

The Court: You have heard the evidence and the argument, ladies and gentlemen of the jury.

Now, it is the duty of the court to instruct you as to the law governing the case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the [12] instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Verda A. Gorey, and the answer thereto of the defendant, The National Life and Accident Insurance Company. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by

you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiff in a civil action, such [13] as this, to prove every essential element of plaintiff's case by a preponderance of the evidence. If the proof fails to establish any essential element of plaintiff's case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth, after you have considered all the evidence in the case.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts.

Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption. [14]

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from

facts which you find have been proved, such inferences as seem justified in the light of [15] your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testified, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or [16]

willful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

During the trial of this case certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented in the form of a deposition. Such testimony is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

The defendant, The National Life and Accident Insurance Company, is a corporation, and as such can act only through [17] its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are

in contemplation of law the acts and omissions respectively of a corporation whose agent he is.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after considering all the evidence [18] in the case, the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

You are not bound to decide any issue of fact in accordance with the testimony of any number of

witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and most trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability points to the accuracy and honesty of the one witness.

The burden is upon the plaintiff in this case to prove by a preponderance of the evidence that at the time of death of George E. Gorey the life insurance policy involved in this case was in full force and effect and all premiums paid up to that date.

To establish the defense of avoiding that policy of life insurance on the ground of misstatement or concealment by George E. Gorey of material facts, the burden is upon the defendant to prove by a preponderance of the evidence that some material misstatement was made by George E. Gorey, or that said George E. Gorey concealed some material fact from the defendant, and that the defendant would never have issued the policy but for such concealment or misstatement.

An insurance company has the unquestioned right to determine for itself what risks it will accept, to select those whom it will insure, and to rely upon an applicant for insurance of such information as it desires as a basis for its determination so that it may exercise a wise discrimination in selecting its risks. The defendant company was therefore entitled to know the truth as to the facts relative to George E. Gorey's physical condition and medical history insofar as it made inquiry of him at the time he applied for the insurance policy involved in this action and insofar as such facts were then known to and understood by George E. Gorey himself.

It is the duty of each party to a contract of insurance to communicate to the other, in good faith, all facts within his knowledge which are or which he believes material to the contract, and which the other party has not the means of ascertaining. [20]

Answers to questions in an application for insurance are generally deemed material representations of fact, which, if false, may vitiate the policy.

If an insurance company is misled by misstatements or concealments of an insured person into issuing a policy it would not otherwise have issued, the company is not liable on the policy, regardless of whether the failure of the insured person to state the true facts as known and understood by him was intentional or unintentional.

The representations of George E. Gorey in his application for insurance in question here were material, if they were such as to mislead the defendant

into issuing a policy which the defendant would not otherwise have issued.

The defendant alleges that George E. Gorey made certain false representations to the defendant company in his application for the insurance policy, in that he did conceal by failing to disclose in said application a certain ailment or disease, namely, an ailment or disease of the heart, for which he had consulted a physician. The defendant further contends that George E. Gorey concealed, by failing to disclose in his application, that he had ever consulted a physician before the date of the making of the application on April 14, 1954.

A concealment is a neglect to communicate that which a party knows and ought to communicate.

If you find from a preponderance of the evidence that George E. Gorey had knowledge of such facts but concealed them from the defendant, as the defendant alleges, and further find that the defendant would never have issued the policy if the defendant had known and understood whatever George E. Gorey may have known and understood with respect to such matters at the time of the issuance of the policy, then your verdict should be in favor of the defendant.

The defendant also *defense* this action upon the ground that, in his written application for the issuance by the defendant of the insurance policy involved in this action, George E. Gorey agreed with the defendant that the proposed insurance policy would not be effective unless the policy was delivered to and accepted by him during his lifetime and

good health, and the policy issued to him so provided.

The term "good health" contained in the application and the insurance policy does not mean perfect health, but does mean an ordinary and reasonable degree of health.

If you find that George E. Gorey was not in good health at the time the insurance policy was delivered to and accepted by him, and if you further find that George E. Gorey had knowledge that he was not in good health at such time and that the defendant had no knowledge thereof at such time, and that the defendant would never have issued the policy if the defendant had known and understood whatever George E. [22] Gorey may then have known and understood with respect to the state of his health, then the insurance policy did not become effective upon delivery to George E. Gorey or thereafter, and your verdict should be for the defendant.

If you find from the evidence that the insured, George E. Gorey, was not in good health at the time he made his application for insurance but did not know it, the representation by said insured that he was in good health will not void the policy.

The parties to this action have stipulated or agreed that the principal amount involved in the life insurance policy in question is $8,824 and that interest on that amount at the rate of seven per cent per annum from the death of George E. Gorey until this date amounts to $607, a total sum of $9,431. Accordingly, the amount of your verdict

should be for the sum of $9,431 in the event you find in favor of the plaintiff.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold [23] any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the court to decide whether, under the rules of evidence, such testimony or other evidence may be received.

Whenever the court has sustained an objection to an offer of evidence, the jury are not to consider in their deliberations the offer or the objection, or the ruling of the court in rejecting the offered evidence.

Thus when the court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury as-

sume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case.

In allowing evidence to be introduced over the objection of counsel, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your mind if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judge—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as foreman. The fore-

man will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. I will exhibit them to you. They are both entitled in the court and cause and the first one reads,

"We, the jury in the above-entitled cause, find in favor of the plaintiff, Verda A. Gorey, and against the defendant, The National Life and Accident Insurance Company, for the sum of * * *" blank dollars. And then, "Los Angeles, California." And then "November" blank "1956." And then a line for signature over the words "Foreman of the jury."

The other form provides, entitled in the court and cause,

"We, the jury in the above-entitled cause, find in favor of the defendant, The National Life and Accident Insurance Company, and against the plaintiff, Verda A. Gorey, for the sum of * * *" blank dollars. And then "Los Angeles, California. November" blank "1956." And then a line for signature over the words "Foreman of the Jury."

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman complete the form. If your verdict be unanimous in favor of the plaintiff, you will have your foreman write in the amount thereof and complete the date and sign that form of verdict as foreman of the jury.

If you are in unanimous agreement and your verdict is in favor of the defendant, you would use

the other form and have the foreman complete the date and sign as foreman of the jury. You will then return with your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. Never attempt to communicate with the court by sending an oral message by the bailiff. Always send a written message. The court will reply in writing or summon you back into court and reply to you in open court, but never through oral communication. Never give or accept an oral communication from the court unless it be with respect to continuing your deliberations or going to lunch or to dinner, or some such matter of your convenience — but nothing concerning the case.

And bear in mind you are not to reveal to the court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict. [27]

* * * * *

The Court: Has the plaintiff any objections or exceptions to make with respect to the instructions given or refused?

Mr. McManas: The plaintiff is not going to make any objections or exceptions to the instructions.

The Court: Is the defendant?

Mr. Morrow: Yes, your Honor, the defendant has for the record.

If the court please, I have some notes on these matters, which I trust are reliable. There are a few

that have been interchanged, and if I stumble around on a few of them I trust your Honor will bear with me for a moment.

I might say, since I don't have this in my notes, I notice your Honor did apparently not give No. 20.

The Court: I haven't given it yet. I wait to give that until last. I take it you have no objection.

Mr. Morrow: No, no, your Honor. I wasn't certain what the situation was. We are not objecting to that. As a matter of fact, we want it.

Now, taking the objections up in order—the clerk just handed me an instruction entitled 12-A.

The Court: I had my secretary rewrite it to make the changes you requested this morning on Instruction 12-A to strike the phrase "may return the premiums and cancel," and insert instead, "is not liable on the policy."

Mr. Morrow: Yes, your Honor. I am trying to find my notes here. I think I will save time by using it.

Shall I proceed, your Honor?

The Court: Oh, yes.

Mr. Morrow: The first one the defendant objects to is No. 6-A relating to expert witnesses. Your Honor, briefly for the record, we object to the giving of the entire instruction on the ground that there was only one witness called in this case which might possibly be considered to be an expert; and we believe, however, that he was not called as an expert. He was only asked to give testimony relative to what actually occurred, not as an expert. And, therefore, we feel that the instruction is in-

correct as applied to the circumstances of this case, and that the wording, in particular "and you may reject entirely if you conclude the reasons given in support of the opinion are unsound * * *" We believe might well confuse the jury with respect to Dr. Kerchner's testimony; he being a major witness for the defendant.

No. 11—pardon me just a moment, your Honor —line 17, the defendant objects to the clause reading "* * * and that the defendant would never have issued the policy but for such concealment and misstatement * * *" as against the law, and we have heretofore suggested to the court and the proper substitute clause for that would read as follows: "and that defendant was induced to issue the policy by reason of any such material misstatement or concealment."

No. 12, your Honor, line 17, the defendant objects to the inclusion of the words "and understood by," which referred to George E. Gorey as not being required by law and being improper under the law; namely, that if the instruction is given if such facts were known to him that it is improper to add the further words "and understood by."

The reason for my hesitation, your Honor, is that I am examining the new instruction 12-A which the clerk has just handed me.

The Court: It is the one I read to the jury.

Mr. Morrow: Yes. That instruction, your Honor, 12-A, line 12, the words "generally deemed," referring to material representations, we object to in—

we object to that as against the law, in that the only representations or concealments involved in this case are material representations and concealments, as a matter of law, under the authorities in cases. Therefore, the jury might well be misled in that connection.

In line 13, the defendant objects to the word "may," referring to "vitiate the policy." Under the law the defendant contends that the word should be "will" and not "may."

Lines 23 to 25, the defendant objects to those, that clause, reading "If they were such as to mislead the defendant into issuing a policy which the defendant would not have otherwise have issued" as being contrary to the law applicable.

And, instruction No. 13, the defendant objects to the clause commencing on line 21 and ending on line 24, reading as follows:

> "* * * would never have issued the policy if the defendant had knowledge of whatever George E. Gorey may have known and understood with respect to such matters at the time of the issuance of the policy,"

as being contrary to the law applicable.

The Court: Is that the way it reads?

Mr. Morrow: That is the way I have got it. It is conceivable that we may have——

The Court: If defendant had known and understood whatever George E. Gorey may have known and understood,—isn't that the way it reads. Let me look at the original.

Yes, that is the way it was given.

"And further find that the defendant would never have issued the policy if the defendant had known and understood whatever George E. Gorey may have known and understood with respect to such matters at the time of the issuance of the policy, your verdict should be in favor of the defendant."

Mr. Morrow: It may be, as I said, there were two or three switches of papers, that we got them switched. But I'll defer to your Honor's reading.

The Court: That's the way it was given.

Mr. Morrow: Then I will amend the objection to conform to your Honor's statement of that part of the instruction as given. Thank you.

Instruction No. 14, the line commencing—line 22, reading as follows:

"And that the defendant would never had issued the policy if the defendant had known and understood whatever George E. Gorey may then have known and understood with respect to the state of his health,"

we object to that as being an incorrect statement of the law applicable. [33]

If the court please, the defendant objects to the ruling of the court and the court not giving the defendant's requested instructions Nos. 3, 5, 8, 9, 10, 11, 12 and 13.

The Court: Upon the ground heretofore stated?

Mr. Morrow: Yes, on the ground heretofore stated, your Honor. And we believe in that connection that the instructions are proper statements of the law applicable and that the instructions should

have been given under the facts, or under the evidence received in this case.

That completes our statement, your Honor, at this time.

The Court: Very well. Will you summon the jury, Mr. Bailiff?

(Whereupon the jury re-entered the court-room.)

(The following proceedings were had in the presence of the jury:)

The Court: Is it stipulated, gentlemen, that the jury are present?

Mr. McManas: So stipulated.

Mr. Morrow: So stipulated.

The Court: Mr. Ferguson, happily it hasn't been necessary to call upon you to continue further in the case. If you will remain after the jury have retired, I will instruct you further.

Before concluding the instructions, I think it is proper to caution you that nothing I have said in the instructions and nothing in any form of verdict which has been prepared for your convenience is to suggest or to convey to you in any way or manner any intimation as to what I think your verdict should be. What the verdict shall be is the sole and exclusive duty and responsibility of the jury, of course.

Mr. Clerk, will you swear the bailiffs?

The Clerk: Yes, your Honor.

(Whereupon the bailiffs were sworn.)

The Court: Ladies and gentlemen of the jury, you will be in the custody of the bailiffs who have

just been sworn. The instructions of the court, as read, have been filed and they will be sent with you to the jury room, along with the exhibits in the case.

* * * * *

[Endorsed]: Filed February 15, 1957.

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[Endorsed]: No. 15442. United States Court of Appeals for the Ninth Circuit. National Life and Accident Insurance Company, Appellant, vs. Verda A. Gorey, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 18, 1957.

Docketed: February 18, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15442

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY, Appellant,

vs.

VERDA M. GOREY, Appellee.

## APPELLANT'S STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The points upon which appellant, The National Life and Accident Insurance Company intends to rely on this appeal are as follows:

Point I. Appellant's defenses were each proved by uncontradicted evidence and the trial court erred in denying appellant's motion for a directed verdict. The trial court erred in denying appellant's motion for an order setting aside the verdict and for judgment under Federal Rules of Civil Procedure, Rule 50(b). Appellant is entitled to judgment.

Point II. The trial court committed prejudicial and reversible error in giving certain jury instruc-

tions and in refusing to give certain jury instructions requested by appellant.

Dated: February 25, 1957.

OVILA N. NORMANDIN and
JOHN C. MORROW,
/s/ By JOHN C. MORROW,

Attorneys for Appellant, The National Life and Accident Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 27, 1957. Paul P. O'Brien, Clerk.